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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 852

TEITELBAUM FURS, INC., a California corporation; TEITELBAUM FURS, INC., a New York corporation; TEITELBAUM FURS OF PALM SPRINGS, INC., a California corporation,

Petitioners,

vs.

AMERICAN HOME INSURANCE COMPANY, a corporation; CALEDONIAN INSURANCE COMPANY, a corporation; CERTAIN UNDERWRITERS AT LLOYD'S LONDON subscribing to Certificate LA 5939/RC 45820; THE DOMINION INSURANCE COMPANY, LTD.; THE LONDON AND EDINBURGH INSURANCE COMPANY, LTD.; ANGLO-SAXON INSURANCE ASSOCIATION, LTD.; THE WORLD'S MARINE AND GENERAL INSURANCE COMPANY, LTD.; THE ROYAL SCOTTISH INSURANCE COMPANY, LTD.; TRENT INSURANCE COMPANY, LTD.; ST. HELENS INSURANCE COMPANY, LTD.; EXCESS INSURANCE COMPANY, LTD.; THE WORLD AUXILIARY INSURANCE COMPANY, LTD.; ENGLISH AND AMERICAN INSURANCE COMPANY, LTD.,

Defendants and Respondents.

TEITELBAUM FURS, INC., a California corporation; TEITELBAUM FURS, INC., a New York corporation; TEITELBAUM FURS OF PALM SPRINGS, INC., a California corporation,

Petitioners and Respondents on the Cross-Appeal.

PETITION FOR WRIT OF CERTIORARI.

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Petitioners,

vs.

AMERICAN HOME INSURANCE COMPANY, a corporation; CALEDONIAN INSURANCE COMPANY, a corporation; CERTAIN UNDERWRITERS AT LLOYD'S LONDON subscribing to Certificate LA 5939/RC 45820; THE DOMINION INSURANCE COMPANY, LTD.; THE LONDON AND EDINBURGH INSURANCE COMPANY, LTD.; ANGLO-SAXON INSURANCE ASSOCIATION, LTD.; THE WORLD'S MARINE AND GENERAL INSURANCE COMPANY, LTD.; THE ROYAL SCOTTISH INSURANCE COMPANY, LTD.; TRENT INSURANCE COMPANY, LTD.; ST. HELENS INSURANCE COMPANY, LTD.; EXCESS INSURANCE COMPANY, LTD.; THE WORLD AUXILIARY INSURANCE COMPANY, LTD.; ENGLISH AND AMERICAN INSURANCE COMPANY, LTD.

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TEITELBAUM FURS, INC., a California corporation; TEITELBAUM FURS, INC., a New York corporation; TEITELBAUM FURS OF PALM SPRINGS, INC., a California corporation,

Petitioners and Respondents on the Cross-Appeal.

PETITION FOR WRIT OF CERTIORARI.

This is a petition for a writ of certiorari directed to the Supreme Court of the State of California to review and reverse a judgment of that court made and entered October 25, 1962 by which it directed the entry of judgments nothwithstanding the verdict against the petitioners, the three plaintiff corporations herein, after

a jury trial in which the plaintiffs were awarded full damages for breach of insurance contracts entered into by the plaintiffs and the defendant corporations.

This petition is based on the ground that the decision of the Supreme Court of the State of California is State action which impairs the obligation of contracts of the plaintiff corporations in violation of Article I Section 10 U. S. Constitution and the Due Process and Equal Protection clauses of the 14th Amendment U. S. Constitution. The decision holds that when an officer of corporations is convicted in a criminal case of a crime connected with their insurance it becomes *res judicata* and collaterally estops the three corporations of their right to proceed to trial and judgment upon breach of their insurance contracts for losses incurred under the paid up policies of insurance, and for which a jury after hearing all the evidence, including the criminal conviction, awarded full damages to the insured for their losses. This was not the law of the states when the policies of insurance were made and paid for. The decision therefore retrospectively alters California law unconstitutionally and directs plaintiffs of their rights under our contracts.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1257(3), U. S. Codes and by the Rules of the Supreme Court of the United States.

The judgment of the Supreme Court of California was rendered October 25, 1962. A petition to recall the remittitur was duly and regularly filed and denied by the Supreme Court of California on January 16, 1963. Upon application of petitioners Justice Douglas

duly and regularly extended the time within which to docket and file the appeal from the judgments to and including February 22, 1963. This petition for certiorari is being duly filed within the said time.

Opinions Below.

The opinion of the District Court of Appeal, State of California, in this action is printed in 203 A. C. A. 589; 21 Cal. Rep. 671 and is also appended to this petition. The opinion of the Supreme Court of California is printed in 58 A. C. 615, 375 P. 2d 439 and is also appended to this petition. The opinion in the earlier criminal case is reported in 163 Cal. App. 2d 184, hearing denied October 24, 1958, cert. denied 359 U. S. 206.

No opinion was written by the Supreme Court in its judgment of denial of the order to recall the remittitur and to vacate and set aside the judgment of October 25, 1962, which denial was on January 16, 1963.

Statutes Involved.

These are in Appendix C, attached hereto.

Statement.

Petitioners are three corporations engaged in the manufacture and sale of fur garments. Teitelbaum Furs, Inc., a California corporation, is organized under the laws of the State of California; Teitelbaum Furs, Inc., a New York corporation, is organized under the laws of the State of New York; and Teitelbaum Furs of Palm Springs, Inc., a California corporation, is a corporation organized under the laws of the State of California.

American Home Insurance Company is a corporation of Great Britain qualified to do business in the State of California and doing business in the County of Los Angeles. The other defendants are surplus insurers under the provisions of Section 1760, *et seq.*, of the California Insurance Code, known as Underwriters at Lloyd's and are referred to as Underwriters at Lloyd's [See C. T. 1, *et seq.*]. The Caledonian Insurance Company is a Great Britain corporation, qualified to do business in the State of California [see C. T. 11].

Petitioners, for a valuable consideration entered into contract policies of insurance with the defendant corporations on October 7, 1954 which insured the petitioners in their property, consisting of furs, fur garments, garments trimmed with fur and all materials entered in the manufacture of fur garments or garments trimmed with fur owned by the said plaintiffs, who are referred to collectively as assured, and also all property held in trust on memorandum or on consignment or sold but not delivered or removed or belonging to others and for which assured might be liable in the event of loss. The total amount of insurance covered 225 garments of fur of the total value of $244,510.90 [C. T. 14].

On January 18, 1957 petitioners filed a complaint in the Superior Court of the State of California for insurance because the defendant companies had failed and refused to pay for losses on verified claims of petitioners. On March 13, 1957 petitioners filed an amended complaint for the payment of insurance [C. T. 1, 11] upon the verified claims of loss of furs.

Petitioners claimed insurance for the loss of 231 garments in the sum of $248,812.40 but this was later reduced to 225 garments, by reason of reaudit.

In their verified complaint for insurance pursuant to the terms of the policy petitioners alleged that on the 27th day of December, 1955, and while the policies of insurance were in full force and effect, four persons, whose names were unknown to the assured, their officers, agents and employees, entered upon the premises of the petitioners in the City of Beverly Hills, County of Los Angeles, State of California, where the furs and fur garments were kept and against their will and without their consent, or the consent of their officers, agents or employees, carried off and removed from the building and stole 225 garments of fur of the total value of $244,510.90. The complaint alleged that the loss was not caused by the design or procurement on the part of the plaintiffs, or any of them and that nothing in connection therewith was done with or with the privity or consent of the petitioners, or any of the said petitioners, or for the purpose of violating any condition of the policy.

Immediately after the robbery of December 27, 1955, the Beverly Hills police and insurance companies caused an investigation to be made of the robbery in which Albert Teitelbaum, the president of Teitelbaum Furs, had been tied up, and the furs removed from his swank Beverly Hills fur establishment. They requested him to furnish a list of the garments which had been stolen. This list furnished the basis of the criminal prosecution. Verified claims were later filed with the insurance companies on their forms.

The insurance companies also commenced a suit in declaratory relief for a declaratory judgment by the court of the respective rights, duties and liabilities of

the plaintiffs and defendants under the respective policies of insurance as to them, allowed the suit to pend until one year had expired from the date of the robbery, and then on December 29, 1956 entered a request for a dismissal and a judgment of dismissal of the defendant corporations' suit was entered.

Thereafter, the petitioners filed their action for the loss and for breach of contract by the insurance companies and for payment of the insurance money as set forth in the policies of insurance.

Defendants answered the complaint and denied their liability under the policies and under the claims duly filed with the insurance company on the forms required by the insurance company and in the manner required by the insurance company. In California pre-trials are held now and the pre-trial statements, in effect, supersede the pleadings and present the issues to be tried. The joint pre-trial statement of the parties prepared by the attorney for defendants on their stationary and joined in by petitioner's counsel sets forth the issues. Plaintiffs claimed that the criminal prosecution of Teitelbaum was inspired by the insurance companies to defeat the insurance claims. Defendants claimed the criminal prosecution and conviction barred the plaintiffs from recovering. The jury heard both sides completely and decided for the plaintiffs in full on the issues set forth below.

The joint pre-trial statement of the issues in the civil case follow:

"In the Superior Court of the State of California in and for the County of Los Angeles.

Teitelbaum Furs, Inc., a California corporation, et al., Plaintiffs, vs. The Dominion Insurance Company, Ltd., et al., Defendants. No. 672,724.

"JOINT PRE-TRIAL STATEMENT"

"The plaintiffs are three corporations, all engaged in the same business, namely, that of selling furs and manufacturing fur garments for sale. Teitelbaum Furs, Inc. is a California corporation located in Beverly Hills; Teitelbaum Furs, Inc. is a New York corporation located in the City of New York; and Teitelbaum Furs of Palm Springs, Inc. is a California corporation.

"The defendants are, as set forth in their answers, insurance companies who issued policies of insurance to the plaintiffs.

"The plaintiffs' amended complaint for insurance contains a claim that on December 27, 1955, the Teitelbaum fur store at 414 North Rodeo Drive was robbed and that four unknown persons entered the premises of the plaintiffs and without their consent and against their will stole fur garments of the value of $248,812.40.

"On April 17, 1956, the insurance companies filed a suit in declaratory relief to determine their rights under the insurance policies which they had issued to the plaintiffs. The claims set forth in the action for declaratory relief would have determined all the rights and obligations of all of the parties. The suit was never brought to trial but was dismissed on December 28, 1956. Thereafter plaintiffs brought the suit here for the recovery of the insurance.

"PLAINTIFFS' CONTENTIONS OF FACT AND LAW
(Pre-trial Statement)

"I. Plaintiffs contend that Albert Teitelbaum, who operated the store, immediately called the Beverly Hills Police, who came to the store, sealed the vault and began taking inventory the next day in conjunction with an auditor for the insurance companies, and a claim for the loss was filed with the insurance companies.

"II. Plaintiffs contend that on February 11, 1956, Clifford Vanderwyst came to the Beverly Hills police and informed them that he was one of the men who entered the store on December 27, 1955, and that there was no robbery, but a pretended robbery. On February 14, 1956, Albert Teitelbaum was arrested and charged along with Clifford Vanderwyst and Claude Wilson with conspiracy to commit grand theft and filing false claim for insurance.

"III. The action is brought by said plaintiffs against defendants to recover the loss upon the policies of insurance, which are attached to the amended complaint as exhibits.

"It is substantially alleged in the amended complaint that each of the defendants issued the policies of insurance upon property consisting of furs, fur garments, and garments trimmed with fur, owned by the plaintiffs. That each of the policies of said defendants was in full force and effect on December 27, 1955.

"It is further alleged that on that date four unknown persons entered the store of the assured in

the City of Beverly Hills, County of Los Angeles, and against the will and without the consent of any of the assured, carried away fur garments of the value of $248,812.40. It is alleged that plaintiffs, upon discovering the loss, gave prompt notice of loss to the defendants and general, plaintiffs have performed all the conditions of said policies to be performed by them.

"More than one year elapsed subsequent to said loss and prior to the commencement of this action. Each of the policies contained a provision limiting the time in which such action could be brought to a period of one year after the loss. Plaintiffs have alleged affirmatively that the action was not commenced within one year but that the defendants have waived that period of limitation and that the waiver consisted in the defendants having brought and maintained, during the entire one year period, an action for declaratory relief in which all the issues herein would have been determined, so that the bringing of an action by the plaintiffs until the dismissal of said action for declaratory relief would have served no useful purpose and that the plaintiffs' attorney furthermore believed and relied upon said action for declaratory relief. The allegations of said action for declaratory relief are substantially set forth in paragraph XVII of the first count of plaintiffs' amended complaint and all the facts constituting said waiver are contained in paragraphs XVI through XXI of the first count of plaintiffs' complaint.

"IV. It is further the plaintiffs' contention that the arrest of Albert Teitelbaum, and his trial on

the charges contained in the information in the Superior Court, were and are the result of a conspiracy on the part of the insurance company and its agents and representatives to defeat the claim and avoid the payment of the insurance money to the plaintiffs. (Defendants contend that this matter is not properly in issue).

"V. Plaintiffs further contend that the corporations are entitled to be paid $248.812.40 for the loss which occurred on December 27, 1955.

"DEFENDANTS' CONTENTIONS OF FACT AND LAW

"I. Defendants deny that any loss or theft occurred. It is the contention of defendants that Mr. Albert Teitelbaum, also known as Al Teitelbaum, did stage a fake holdup in order to defraud the defendants and wrongfully collect moneys from defendants. Defendants contend that plaintiffs lost no furs and suffered no loss whatsoever under any policy of insurance issued by defendants.

"II. Defendants contend that plaintiffs' action is barred by the provision in the policies of insurance issued by defendants requiring the suit be commenced within twelve months after discovery by the assured of the occurrence giving rise to the claim. In this respect plaintiffs alleged that their loss occurred December 27, 1955 and plaintiffs' action was not commenced until a period of time in excess of said twelve months.

"III. Defendants further contend that Albert Teitelbaum, also known as Al Teitelbaum, was

president and director of each of the plaintiff companies, was the principal shareholder in each company, and was, together with his wife, the sole owner of each plaintiff company, and that said Albert Teitelbaum used each of the plaintiff companies for the conduct of his personal business, and that each of the plaintiff corporations was the double and alter ego of Albert Teitelbaum. Defendants also contend that all of the acts done by Albert Teitelbaum were done as president and acting on behalf of the plaintiff corporations.

"Defendants further contend that said Albert Teitelbaum has been convicted of attempting to defraud the defendant insurance companies and of conspiracy to commit grand theft, of attempted grand theft, and of the filing of a false and fraudulent insurance claim against these defendant insurance companies in violation of Section 556 of the Insurance Code, and that said Albert Teitelbaum was further convicted of a violation of Section 556 of the Insurance Code in the presentation of a false and fraudulent claim against these insurance companies respecting the alleged events set forth in plaintiffs' complaint and that the subject matter of said criminal action respecting the claims to insurance companies was identical with the subject matter of this action. Defendants further contend that by reason of said conviction, which has been affirmed by the District Court of Appeal and a hearing denied by the California Supreme Court, and by the United States Supreme Court, that plaintiffs are not permitted to benefit by their own

crime and the crime of their president, and that it has been conclusively adjudicated that the plaintiffs' claim is fraudulent.

"IV. Defendants further contend that plaintiffs' action is barred by reason of the fact that said Albert Teitelbaum, president of each of the plaintiff corporations, did refuse and neglect to appear and complete his examination under oath, which is a requirement of each of the policies of insurance sued upon by plaintiffs, and that said failure constitutes a complete defense to plaintiffs' action.

"V. Defendants further contend that plaintiffs' action is barred by reason of misrepresentation and fraud by each of plaintiffs in that they falsely informed defendants that a loss occurred, falsely represented the amount of the loss, falsely informed defendants that the loss occurred without plaintiffs' connivance, knowingly furnished defendants with a false and untrue sworn proof of loss, did falsely swear through their president at an examination under oath respecting the occurrence of an alleged loss and respecting details of an alleged burglary which never occurred and respecting the amount of the alleged loss, and that plaintiffs did furnish to defendants three separate and conflicting lists of property purportedly stolen, each of which lists was false and untrue in toto.

"VI. Defendants further contend that if plaintiffs sustained any loss that such loss was caused by dishonest acts on the part of persons to whom the property was delivered or entrusted by officers and employees of plaintiffs, or by officers

and employees of plaintiffs, and that under such circumstances there is no coverage afforded by defendants' policies.

"ISSUES TO BE TRIED

"I. Whether plaintiffs were robbed and suffered a loss of $248,812.40, or any part thereof, on December 27, 1955.

"II. Whether defendants' having filed a suit for declaratory relief waived any provisions in the policies that would require suit to be commenced within twelve months.

"III. Whether or not plaintiffs' complaint set forth facts sufficient to constitute a cause of action in that the plaintiffs' complaint shows that the policies sued upon require suit to be commenced within twelve months after discovery of the occurrence giving rise to the claim, and whether failure to file within twelve months bars recovery.

"IV. Whether the matters set forth in plaintiffs' complaint as to the defendants' conduct constituted a waiver of the provisions of the policy or are ineffectual to constitute an estoppel.

"V. Whether the plaintiff corporations were the double and alter ego of Albert Teitelbaum. (Plaintiffs contend this is not an issue as a matter of law).

"VI. Whether the arrest of Albert Teitelbaum and his trial was the result of efforts on the part of the insurance companies to defeat the claim for insurance. (Defendants contend this is not an issue and is not properly before the court).

"VII. Whether Albert Teitelbaum has been convicted of attempting to defraud the insurance companies and of conspiracy to commit grand theft respecting the identical claims involved in the instant action and if so, whether such conviction is a defense to the actions by the plaintiff corporations and prevents the recovery by the plaintiff corporations, or any of them, in the instant action. (Plaintiffs contend this is not an issue).

"VIII. Whether plaintiffs' action is barred by refusal of Albert Teitelbaum to complete an examination under oath.

"IX. Whether plaintiffs' action is barred by reason of any misrepresentation and fraud.

"X. Whether, if plaintiffs sustained any loss, such loss was caused by dishonest actions on the part of persons to whom the property was delivered and entrusted by officers and employees of plaintiffs, or by dishonest acts of officers and employees of plaintiffs themselves.

"XI. Whether the defendants, and each of them, have conspired with persons to defeat the legitimate claims of the plaintiffs. (Defendants claim that this is not an issue properly before this court).

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"Attorney for plaintiffs,

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"JAMES O. WHITE, JR.,
"By JAMES O. WHITE, JR.,
"Attorneys for defendants."

Before filing the proof of loss in the form and manner required by the contracts of insurance, petitioners supplied the police and defendants' agents with preliminary estimates of the quantity and description of merchandise thought to be missing. On February 14, 1950 the petitioners' president, Albert Teitelbaum, was arrested by Officer Borders, of the Beverly Hills Police Department, on charges growing out of the robbery. Borders claimed the robbery had been "arranged" to collect insurance. Defendants denied this. On or about March 7, 1950, Teitelbaum was indicted with Clifford Vanderwyst, and Claude Wilson for conspiracy to commit grand theft, attempted grand theft and presentation and filing of false insurance claims under the provisions of Section 550 of the Insurance Code.

At the trial of Teitelbaum on the charges in the criminal court Mr. Teitelbaum did not take the witness stand except for a limited purpose of denying a statement which a police officer had attributed to him. Nor did co-defendant Claude Wilson. The defense in the criminal case rested its case principally on the weakness of the prosecution's case. The criminal case was based principally upon the testimony of one Clifford Vanderwyst, an ex-convict with five previous convictions also referred to as Weiss, the alleged co-conspirator and Officer Borders of the Beverly Hills Police Department (later demoted) and a Captain Huff.

In the trial which is here the subject of this petition for a writ, time had altered matters. Teitelbaum testified fully and completely, in this case but the ex-convict witness Vanderwyst was not produced by the defendants nor was Claude Wilson available. Officer

Borders who brought about Teitelbaum's arrest, came under a serious cloud with the Police Department and was under investigation, suspension and demotion for misconduct [C. T. 138, *et seq.*; see also Clerk's Record].

Borders v. Anderson, 204 A. C. A. 448.

Although the Supreme Court of California said in its opinion "that a criminal judgment is subject to collateral attack on the ground, for example, that it was obtained through the knowing use of perjured testimony (*Mooney v. Holohan*, 294 U. S. 103; *Alcora v. Texas*, 355 U. S. 28)" the California Supreme Court nevertheless in this case denies the right of the jury trying it to infer that Teitelbaum's conviction in the criminal case was the result of perjured testimony knowingly produced by Borders, a police officer and an officer of the state.

In the criminal trial, Borders produced one Clifford Vanderwyst, previously convicted of five felonies, as the state's star witness. It was Vanderwyst who claimed in February, 1956 to have staged the robbery of the fur store the previous December 27, 1955 and in the criminal trial to have testified it was "faked." For some supposedly noble reason, he had walked into the Beverly Hills police station in February, 1956 and "confessed" to staging the robbery December 27, 1955 to help set up an insurance claim. Of course he was given immunity by the state, but in the civil case the defense did not produce Vanderwyst and he did not appear. Borders, whose association with ex-convicts brought him into disrepute and demotion from captain to a patrolman and then dismissal, testified to what Vanderwyst had previously said, as an admission against

Teitelbaum. The jury in this case had a right to conclude, as it did, that Vanderwyst's story in the criminal trial was perjured and knowingly produced by the state in the first case, and to accept Teitelbaum's version as true. As shown by the joint pre-trial statement in this case, this was one of the issues for the jury to decide and it did decide it favorably to the plaintiffs herein. Plaintiffs contended in this trial that Borders worked in collaboration with the defendants to defeat plaintiffs' claims. (See also Clerk's record.) Teitelbaum's conviction was sustained on appeal (*People v. Teitelbaum*, 163 Cal. App. 2d 184, hearing denied by the Supreme Court of California October 24, 1958, cert. denied by the United States Supreme Court 359 U. S. 206). The appellate court stated that error had been committed, but not sufficient to reverse the judgments. The present civil case was pre-tried on the civil complaint against the insurance companies on December 30, 1959.

After hearing all the evidence including the conviction of Teitelbaum and being fully instructed as to the law, the trial started and a jury was duly selected on May 24, 1960. This jury found for the petitioners for the full amount of their loss and against the defendant companies and assessed the damages at $61,127.72 against Caledonian Insurance Company, a Corporation, and $122,255.45 against the defendants participating in Lloyd's Certificate LA 5938 RC 45820 (Note: we show it 5939 in the title of the case) [C. T. 46]. From the judgments entered upon the verdict, the defendant corporations moved for a new trial [C. T. 47]. The defendants also moved for judgment notwithstanding the verdict, which issue was submitted on July 19, 1960.

Implicit in this jury finding was that the plaintiff companies were not the *alter ego* of Albert Teitelbaum and that there had been a recoverable loss by plaintiff corporations entitling them to full recovery under their contracts. Further the criminal trial did not estop them in this civil action from rendering a favorable verdict. The trial court denied the motion for judgment notwithstanding the verdict [C. T. 150]. The trial court granted the motion for a new trial on the grounds of insufficiency of the evidence to justify the verdict on the grounds of irregularity of the proceedings of the adverse party through their attorney which prevented the defendants from having a fair trial [C. T. 150].

On July 27, plaintiffs, petitioners herein, duly filed notice of appeal to the District Court of Appeal, Second Appellate District, State of California [C. T. 151]. On September 1 the defendant corporations filed their cross appeal from the judgment entered on May 25, 1960.

On appeal, in the District Court of Appeal, both the defendant corporations raised the question as to whether the conviction of Teitelbaum in the criminal case was a bar to plaintiff's recovery on the insurance policies. The District Court of Appeal held that it was not, and held that even a plea of guilty in a criminal case can be received *only* as an *admission* but not as conclusive and that this rule generally is the same throughout the United States [See also 50 C. J. S. Judgments, Sec. 754(b)(1), p. 269].

A petition for hearing was filed by the petitioners from the order granting a new trial and the defendants herein urged in the Supreme Court that the crim-

inal conviction of Teitelbaum was *res judicata* in this case and that the court should enter judgment notwithstanding the verdict as against the plaintiffs in this case. The judgment of the Supreme Court doing so was rendered October 25, 1962. The Supreme Court decided the case purely on the issue of collateral estoppel and applied retrospectively the law it proclaimed, although a jury in the present case to which this issue was fully presented and adequately instructed concluded that there was no estoppel in the case, and applied the law as it was when the insurance contracts were first entered.

Following the decision of the Supreme Court a petition was duly filed to recall the remittitur on the grounds that the decision of the Supreme Court is State action and, in construing and applying the law under Sections 1908, 1909 and 1910 Code of Civil Procedure in effect, impairs the obligation of contracts of the petitioner corporations in violation of Article I, Section 10 of the Constitution of the United States and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The petition to recall the remittitur also contends that the effect of the conviction amounts to a bill of attainder on the plaintiff corporations forbidden through State action and under the laws of the United States; that neither conviction of a crime any more than that a person is of a different race or color deprives a corporation of the right to due process of law or the equal protection of the laws or of their civil rights to enter the courts and have the case heard on its merits as to a breach of contract (p. 26, petition to recall the remittitur). The defendant corporations replied to the

petition to recall the remittitur, and to this the petitioners again replied that their rights under the Constitution and laws of the United States were denied.

The court on January 16, 1963, denied plaintiffs' petition to recall the remittitur. Thereafter, because the original judgment was entered October 25, 1962, plaintiff petitioners applied to Justice Douglas for an extension of time within which to file and docket the record on appeal in the event the time ran from October 25, 1962 rather than from the date of the denial of the petition to recall the remittitur in January. In any event, Justice Douglas extended the time for docketing the record in the case to and including February 22, 1962.

The District Court of Appeal of the State of California in its opinion, which is attached hereto, held that the judgment in the criminal case is *not res judicata* and is *not* collateral estoppel in the civil case in filing a suit for breach of contract of the insurance policies. This was the law of the State of California when the contracts of insurance were entered.

The Supreme Court of California, which took over the case, held against petitioners, and ordered judgment entered notwithstanding the verdict, thus depriving the petitioners of the benefit of the law of the State at the time the contracts were entered and determination by the jury of the plaintiff corporations' rights because of the conviction in another case of an officer of the corporations on criminal charges between different parties.

This petition for certiorari, therefore, raises the important and fundamental question which affects all in-

surance policies and contracts all over the country as to whether a conviction in a criminal case after a trial of one of its officers results in *a conclusive presumption* of determination of all of the issues in a civil case by corporations who are not represented as such in the criminal case and conclusively breaches and breaks the contract between the corporations, who are plaintiffs, and the defendant corporations, who are insurance companies and carriers of insurance, and for which plaintiffs paid substantial premiums.

The issues are of great importance and should be determined by this Honorable Court.

Questions Presented by This Appeal.

1. Whether the three petitioning corporations, who entered into a contract with the defendant insurance corporations and carriers, can be denied their day in court and their paid up contract breached by an appellate court of a state under the doctrine of *res judicata* or collateral estoppel because an officer of the corporation, in a criminal trial involving him as an individual, has been convicted of one count of conspiracy to commit grand theft, and attempted grand theft and violation of Section 556 of the Insurance Code of the State of California, and also one count violation of Section 556 Insurance Code of the State of California to wit: allegedly filing a false claim for insurance.[1]

[1]The conspiracy and false claim charges grew out of lists of garments given to the police and an insurance adjuster, shortly after the robbery. The civil suit for breach of contract was based on verified claims filed with the insurance companies on forms supplied by them at a later date by the corporate defendants.

2. Whether such procedure denies the petitioners due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. Whether a State may so construe its statutes (Secs. 1908, 1909, 1910 of the Code of Civil Procedure of the State of California) regarding *res judicata* or collateral estoppel so as to impair the obligation of contracts between the petitioners and the defendant corporations and whether such impairment, being State action, through the court's construction and application of these statutes is in violation of Article I, Section 10 of the Constitution of the United States.

4. Whether a State may hold that if a person pleads guilty to a crime that his plea consitutes only an admission of the facts involved but that if he has a *trial* that the result of that trial finding him guilty of the crime is a *conclusive presumption* in any civil action growing out of the transaction so as to bar corporations of which he is an officer from litigating a civil case before another court and jury on whether the corporations' contracts with such parties have been breached and whether the corporations are entitled to damages for breach of contract.

5. Whether the procedure and proceedings had herein are violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and also whether such procedure and proceeding is violative of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

6. Whether a criminal trial involving allegedly conspiracy to commit grand theft, grand theft and allegedly filing of a false insurance claim between the State of California and the defendant, an officer of a corporation, in which the corporate entities are not represented by counsel, and in which the issues presented are whether a crime has been committed under the laws of the State of California, by such individual officer, is *res judicata* in another case before another jury in which the issues and parties are different, to wit: whether contracts have been breached by the defendant corporations and whether the defendant corporations are liable under their paid up insurance contracts.

7. Whether the fact that a defendant in a criminal case is not required to take the witness stand (Article I, Sec. 13, Constitution of California) and does not take the witness stand except for limited purposes to deny a statement made by a police officer, differentiates the case from a civil case where the defendant does take the stand and testifies fully and whether the denial by the California court of the favorable effect of that full testimony before another court and jury is a denial of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.[2]

8. Whether the judgment of conviction on a general verdict of guilty of conspiracy and filing a false claim for insurance in a criminal case where the defendant is unable to call a co-defendant to the witness stand because he declines to testify in the criminal case and

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[2]It is implicit in the last jury verdict that it found that the criminal charges were inspired to defeat the claim for insurance, an issue presented in the pre-trial statement.

the case results in a conviction of the criminal charges, is *res judicata* upon before another jury in a civil case involving different parties and issues to wit, breach of contract of paid up policies of insurance.

9. Whether a State, in imposing the binding effect of a judgment in a criminal case for conspiracy and filing a false claim of an officer of a corporation so as to eliminate a civil case for breach of contract of corporations on their paid up insurance policies, has denied to the petitioners due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

10. Whether a State may, by its court action, impair the obligation of paid up insurance contracts by a summary decision contrary to a jury verdict finding for plaintiffs by ordering judgment to be entered in favor of the defendant insurance corporations because of the results of a criminal conspiracy and filing false claims case involving an officer of the corporation, and whether such procedure and proceeding conspiring and apply in Sections 1908, 1909, 1910, Code of Civil Procedure of California, are not violative of Article I, Section 10 of the Constitution of the United States and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

11. Whether the findings of a jury, in which the issues of *alter ego* are submitted to the jury and found against the defendants' claims that the plaintiff corporations are the *alter ego* of the president of the corporation, are binding on appeal and not subject to being set aside by a summary order of the Supreme

Court and whether such summary order is a denial of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

12. Whether the finding of a jury on the issue of *res judicata*, is binding upon the State Supreme Court on appeal and whether the issue is one of fact and solely within the determination of the jury.

13. Whether the determination of the Supreme Court, in deciding contrary to that of the jury, denied the petitioners due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

14. Whether the law as it existed in California at the time of the entry of the contracts between plaintiffs and defendants became a part of the contracts and therefore was binding on the Supreme Court of California and cannot be set aside retrospectively and retroactively as was done in this case without being a denial of due process of law and the equal protection of the laws guaranteed by the 14th Amendment, United States Constitution, and an impairment of the obligation of contracts in violation of Article I, Section 10, United States Constitution.

Washington v. Maricopa County (C. C. A. 9), 152 F. 2d 550;

McClinbic v. Dunbar Land Co., 127 W. Va. 454, 33 S. E. 2d 593, 158 A. L. R. 1036;

Oklahoma Cotton Growers Assn. v. Salyer, 134 Okla. 25, 243 Pac. 232.

Reasons for Granting the Writ.

The issues in this case are very important, as the effect thereof will widely affect persons who are charged with crime and who are officers of corporations that enter into civil contracts of insurance or other property. Thus if a plea of guilty is entered under this California decision, the plea is only an admission, but if the case is fully tried by a court or jury its judgment becomes a *conclusive presumption* which bars a person charged with crime with any rights in any civil action and if he is an officer of a corporation, the corporation, a separate entity, is estopped to litigate.

This certainly would deny persons or corporations their day in court and would deny due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Where parties have insurance contracts, this would impair the obligation of contract guaranteed by Article I, Section 10 of the Constitution of the United States.

The District Court of Appeal of the State of California correctly evaluated the situation in its opinion, setting forth the law of the State of California as it existed at the time the contract was entered, and which became a part of plaintiffs contracts of insurance when entered and paid for.

The District Court of Appeal in its opinion said:

> "The only point on defendants' cross-appeal from the judgment that merits discussion is that Teitelbaum's conviction in the criminal case is a bar to plaintiffs' recovery on the insurance policies. They rely heavily on the principle of res judicata

as stated in *Bernhard v. Bank of America*, 19 Cal. 2d 807. But the cases in this state do not indicate that a criminal conviction is res judicata in a subsequent civil action. (*Risdon v. Yates*, 145 Cal. 210; *Vaughn v. Jonas*, 31 Cal. 2d 586; *Burbank v. McIntyre*, 135 Cal. App. 482; *Balestreiri v. Arques*, 49 Cal. App. 2d 664; *In re Anderson*, 107 Cal. App. 2d 670, 671; *American Fire etc. Service v. Williams*, 171 Cal. App. 2d 397; *People v. One 1950 Pontiac 2-door Coupe*, 193 Cal. App. 2d 216; 3 Witkin, Cal. Proc. sec. 58, p. 1943; 29 Cal. Jur. 2d, Judgments, sec. 288, pp. 183-184.) That the rule, generally, is the same throughout the United States, see 50 C. J. S., Judgments, sec. 754b(1), p. 269.

"In Risdon the court said (p. 213): '[T]he judgment in a criminal suit cannot be used in a civil action to establish the facts on which such judgment rates.' Even where 'a defendant has *pleaded guilty* in a criminal case the plea and judgment are received in evidence *as an admission, but not as conclusive*.' (Emphasis added.) If a judgment in a criminal case based upon a plea of guilty is 'not conclusive,' a fortiori, a judgment based upon an opinion of a judge or jury, predicated on conflicting evidence, should not be conclusive. Defendants argue that the effect of Bernhard is to make a prior criminal conviction a bar to a subsequent civil action based on the same facts. But the Supreme Court in Vaughn v. Jonas, supra, 31 Cal. 2d 586 (decided six years after Bernhard) again reiterated the Risdon principle, pointing out

also (p. 595) that even a conviction based upon a plea of guilty (as was the fact in the Vaughn case) is not held by the courts 'to be factually conclusive.' In People v. One 1950 Pontiac, supra, the court quoted with approval from In re Anderson, supra, 'that judgments in criminal prosecutions are neither bars to subsequent civil proceedings founded upon the same facts nor proof of anything in such civil proceedings, . . .' In American Fire etc. Service v. Williams, supra, 171 Cal. App. 2d 397, the opinion pointed out (p. 401) that 'the trial court proceeded on the theory that the record made on the contempt citation not only was inadmissible in this civil action for damages, but that it could not be treated as an estoppel, or collateral estoppel, or conclusive adjudication upon the issue whether or not respondents had violated the injunction.' The court then stated: 'We agree with that view. The well-established rule which makes inadmissible a conviction of a criminal offense as proof of the facts upon which the conviction was based is the rule which must be applied here.' However, in the instant case, Teitelbaum's conviction was admissible for the purpose of impeachment. (C. C. P., sec. 2051)

"While there are a few cases in the United States representing a minority view (McCormick, Evidence (1954), sec. 295, pp. 618-619; 50 C.J.S., Judgments, sec. 754b(1), p. 269) to the effect that a prior conviction is a bar to a civil action based on the same facts, *this is not the position of the California courts.*"

The issue of collateral estoppel has been frequently considered by this Court and should be passed upon in the instant case as one of great importance as it affects the states under Article I, Section 10, U. S. Constitution and the 14th Amendment, U. S. Constitution.

The question of collateral estoppel was raised both in the District Court of Appeal and in the Supreme Court of the State of California.

That it raised a question of the impairment of the obligation of contracts under Article I, Section 10 of the Constitution of the United States and under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, were presented to the Supreme Court of the State of California in the petition to recall the remittitur, which petition was opposed and answered and denied and which is a part of this record. The denial of the petition to recall the remittitur on the grounds that these provisions of the Constitution of the United States was violated was made and entered January 16, 1963, by the Supreme Court of California.

Questions Presented Are of Great Importance Entitling Petitioner to the Writ.

The questions involved in this case are of great importance to all persons and corporations. Involved is the proper interpretation of the right of a corporation that enters into a valid contract with other corporations, pays its premiums over a period of years and whether it is entitled to its day in court on the issues of whether it has suffered losses under the insurance policies and the law of the state as it existed when the policies were entered. If this decision holds, then the

trial and conviction of an officer of a corporation for a crime in which the plaintiffs in the civil action are unrepresented and in which the issues are different, are deprived of their day in court. This would impair the obligation of their contracts and violate Article I, Section 10 of the Constitution of the United States and deny them due process of law and the equal protection of the laws.

In California a corporation is a legal person or entity, recognized as having an existence separate from that of its share holders.

Erkenbrecher v. Grant, 187 Cal. 7, 200 Pac. 641;
Hollywood Cleaning etc. Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P. 2d 709;
Maxwell Cafe v. Alcoholic Control, 142 Cal. App. 2d 73, 78, 298 P. 2d 64.

The shareholders, under the laws of California, are not the owners of corporate property and the corporation and the shareholder are distinct parties in contracts made by one or the other.

Baker Divide Mining Co. v. Maxfield, 83 Cal. App. 2d 241, 248, 188 P. 2d 538.

A corporation is a person within the meaning of the due process and equal protection clauses of the federal Constitution and similar provisions of the California Constitution and within the meaning of Code provisions.

Civil Code, Sec. 14;
Penal Code, Sec. 7;
Johnson v. Goodyear etc. Co., 127 Cal. 4, 59 Pac. 304;
2 U. C. L. A. Law Rev. 155, Constitutional Law, Secs. 101, 125.

A corporation is deemed a citizen of the state of incorporation.

Neirbo v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 84 L. Ed. 167.

The law of the State of California at the time that the plaintiff corporations entered into contracts with the defendant corporations provided that a criminal conviction is not *res judicata* in a civil action.

Risdon v. Yates, 145 Cal. 210;

Vaughn v. Jonas, 31 Cal. 2d 586, 191 P. 2d 432;

Burbank v. McIntyre, 135 Cal. App. 42, 27 P. 2d 400;

Balestreiri v. Arques, 49 Cal. App. 2d 664, 122 P. 2d 277;

In re Anderson, 107 Cal. App. 2d 670, 671, 237 P. 2d 720;

American Fire etc. Service v. Williams, 171 Cal. App. 2d 397, 340 P. 2d 644;

People v. One 1950 Pontiac 2-door Coupe, 193 Cal. App. 2d 216, 13 Cal. Rptr. 916;

3 Witkin, Cal. Procedure, Sec. 58, p. 1943;

29 Cal. Jur. 2d, Judgments, Sec. 288, pp. 183-184.

That the rule, generally, is the same throughout the United States see:

50 Corpus Juris Secundum, Judgments, Sec. 754(b)(1), p. 269.

The doctrine of collateral estoppel, if applied in this case, would deny the plaintiff corporations their day in

court under the law as it existed when the contracts were made. Sections 1908, 1909 and 1910 of the Code of Civil Procedure of the State of California, inherently and as construed and applied in this case, as construed and applied are violative of the due process and equal protection clauses of the Constitution of the United States and impair the contracts of the parties in violation of Article I, Section 10 of the Constitution of the United States.

Shelly v. Kraemer, 334 U. S. 1, holds that State action through the courts denies due process of law and the equal protection of the laws.

By the obligation of a contract is meant the means by which at the time of its creation the law affords for its enforcement.

> *Louisiana ex rel. Nelson v. Police Jury,* 111 U. S. 716, 28 L. Ed. 574.

A State court can no more impair a contract than can the legislature.

> *Brown-Crummer Invest. Co. v. North Miami,* 11 F. Supp. 73.

A contract made validly by State laws as expounded by its courts cannot be impaired by any subsequent legislation or decision of its courts.

> *Gelpcke v. Dubuque,* 1 Wall. (68 U. S. 175), 17 L. Ed. 528;
>
> *Havemeyer v. Iowa County,* 3 Wall. (70 U. S. 294), 18 L. Ed. 38;
>
> *Chicago v. Sheldon,* 9 Wall. (76 U. S. 50), 19 L. Ed. 594.

Under broad principles of estoppel, the criminal judgment could be submitted as *prima facie* evidence of such facts as might be determined.

Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 572.

That case holds that the estoppel in a civil action by a conviction of crime extends only to the question distinctly put in issue and rightly determined in the criminal prosecution. In the *Emich Motors Corp.* case the court held that a general verdict of guilty in a prosecution for conspiracy alleged in the indictment to have been effectuated by various means, only one of which need have been proved to warrant the conviction, does not establish that the defendants used all the means charged or any particular one. Likewise, in the instant case, the defendant was charged in the criminal case with conspiracy to have been committed by various means and a general verdict was rendered. The appellate court in the criminal case said that error was committed but that it was not reversible. Teitelbaum was charged with filing a false claim but the claims on which the police and district attorney acted were not the later verified claims upon which the breach of contract was filed.

The trial judge in this case, in his discretion, instructed the jury as to the evidence regarding the application of the criminal judgments and proceedings in a civil action for damages alleged to have resulted from a breach of contract.

See also:

Commissioner v. Sonnen, 333 U. S. 591, 92 L. Ed. 898;

Local 167, IBT v. United States, 291 U. S. 293, 78 L. Ed. 804.

What was decided in the criminal case was, of course, a matter of law to which the trial judge had to instruct the jury. This he did fully and fairly to the defendants in this case.

In the *Emich Motors Corp.* case this Court stated, as to criminal judgments:

> "Such estoppel extends only to questions, 'distinctly put in issue and directly determined' in the criminal prosecution. See *Frank v. Mangum*, 237 U. S. at 334, 59 L. ed. 983; *United States v. Meyerson*, 24 F.2d 855, 856. In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment. Cf. *Commonwealth v. Evans*, 101 Mass. 25 (1869). Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish *prima facie* all matters of *fact* and *law* necessarily decided by the conviction and the verdict on which it was based."

In the case at bar, this was done. The trial judge permitted defendants to introduce all the facts and circumstances relating to the conviction in the trial of the criminal case. He allowed the jury thus to determine, as an issue of fact, such issues as were different and left undetermined in the criminal case. Also to determine if the criminal proceedings were inspired to defeat the claims for the losses.

Where the jury has acted and determined facts, it should not be reversed on appeal.

Lisenba v. California, 314 U. S. 166.

The right to contract and to have its contracts carried out are vested civil rights which the state may not impair without denying due process of law and the equal protection of the laws provided by the Fourteenth Amendment to the Constitution of the United States.

The right to make contracts about one's affairs is a part of the liberty protected by the due process clause.

Morehead v. New York ex rel. Tipaldo, 298 U. S. 587, 80 L. Ed. 1347.

The right to contract is a property right protected by the Fourteenth Amendment.

Crouch v. Central Labor Council, 134 Ore. 612, 293 Pac. 729.

The right to a judgment and to the enforcement of a judgment is a property right protected by the Fourteenth Amendment to the Constitution of the United States.

The right to be plaintiffs in an action for the enforcement of their contracts, as did the three corporations, plaintiffs in this case, is a civil right guaranteed by the Fourteenth Amendment to the Constitution of the United States against invasion by the judiciary. Under the Fourteenth Amendment no state may deny a civil right to any person or to any corporation solely because of his race, color, religion, national origin or conviction of a crime. Such exercise of power would amount to a bill of attainder prohibited by Article I, Section 10 of the Constitution of the United States.

Neither conviction of a crime any more than that he was a person or a different color or race deprives a person or corporation of the right to due process of

law or the equal protection of the laws or of their civil rights to enter the courts and have the case heard on its merits as here on the issue of breach of contract.

In *Shelley v. Kraemer*, 334 U. S. 1, the Supreme Court of the United States held that the state court's judgment was denial of equal protection. The restrictions in that case were enforced by court order and this was state judicial action. The Court there held that it is state action within the scope of the Fourteenth Amendment not only where its judicial officers deny procedural due process or equal protection but where they deny substantive rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The Amendment, the Court held, covers exertion of state power in all forms.

In the decision of the Supreme Court of California the state has made available to the private insurance companies the full coercive power of the government to deny to the plaintiffs, on the grounds of conviction of a crime of one of its officers, the enjoyment of property rights and civil rights, to enforce and to be heard on the enforcement of their contract on an equal footing with all other persons who might be similarly situated. This has all of the elements of a bill of attainder which inflicts punishment upon the plaintiff corporations without a judicial trial and takes away their rights under the contract.

Cummings v. Missouri, 4 Wall. (17 U. S. 277), 18 L. Ed. 356;

Pierce v. Carskadon, 16 Wall. (83 U. S. 234), 21 L. Ed. 276.

The opinion erroneously holds that a conviction in a criminal case in which the corporations were not a party and were not represented by counsel, as such representative of the corporations and did not have the issue before it of the question of breach of contract, was *res judicata* in a civil case of the corporations in which the sole issue was whether the contracts were breached by the insurance companies and whether they were required to pay under the contracts.

In *Hoque v. New Jersey*, 356 U. S. 464, 2 L. Ed. 2d 913, this Court refused to apply the doctrine of collateral estoppel to an acquittal of an accused. This Court stated:

> "In numerous criminal cases both State and federal courts have declined to apply collateral estoppel because it was not possible to determine with certainty which issues were decided by the former general verdict of acquittal. (356 US 472, citing cases) keeping in mind that jury verdicts are sometimes inconsistent or irrational, see, E. G. Dunn v. United States, 284 US 390, 76 L.ed. 356, 80 ALR 161; United States v. Dotterweich, 320 US 277, 88 L.ed. 48; Green v. United States, 355 US 184, 2 L.ed.2d 199. We cannot say that the New Jersey Supreme Court exceeded constitutionally permissible bounds in concluding that the jury might have acquitted petitioner at the earlier trial because it did not believe that the victims of the robbery had been put in fear, or that property had been taken from them, or for other reasons unrelated to the issue of 'identity.'"

Likewise, in the instant case, keeping in mind the fact that the jury in the criminal case brought in a general verdict on entirely different issues than here involved, the jury in the civil case had a right to bring in an entirely different verdict in this case, including whether the criminal case was inspired to defeat the insurance claim by the defendants. To deny the plaintiffs the benefit of this verdict is to deny them their day in court and to deny their vested right to a decision on the breach of contract, and all issues raised by the pre-trial statement.

In *United States v. Radio Corporation of America*, 358 U. S. at p. 352, 3 L. Ed. 2d 366, the court said:

> "The other contentions of appellees fall of their own weight if the FCC has no power to decide antitrust questions. Thus before we can find the government collaterally estopped by the FCC licensing we must find 'whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issues in controversy'. Sunshine Anthracite Coal Co. v. Atkins, 310 US 381, 403, 84 L.ed. 1263, 1276. But the issue in controversy before the Commission was whether the exchange would serve the public interest, not whether Section I of the Sherman Act had been violated. Consequently, there could be no estoppel. Res judicata principles are even more in apposite."

Likewise, in the instant case, the representatives of the plaintiff corporations were not the representatives in the criminal trial nor were the issues the same. The issue in the criminal trial was whether a defendant

had committed certain alleged crimes; in the civil trial, whether there had been a breach of contract in the non-payment of losses under the policy, to plaintiff corporations and whether the criminal trial was brought unproperly to defeat the insurance claims. Consequently, there could be no estoppel and the plaintiffs have therefore been deprived of their day in court.

In *Yates v. United States*, 354 U. S. 298, the defendants argued that a decision in a prior case of *Schneiderman v. United States*, 320 U. S. 118, 87 L. Ed. 1796, created an estoppel as against Yates. This Court after examining the facts, said:

> "We think, however, that the doctrine of collateral estoppel does not establish any such concept of 'conclusive evidence' as that contended for by the petitioner. The normal rule is that a power of judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in a subsequent proceeding. So far merely where inevidentiary or 'mediate' facts are concerned the doctrine of collateral estoppel is inoperative. The Evergreens v. Noonan, CA2d, 141 F.2d 927, 152 ALR 1187, Restatement Judgments 68."

The court, in the instant case, did give such appropriate instructions to the jury and this was the extent to which the defendants are entitled.

We respectfully submit that the issues are important, that the decision of the Supreme Court of California denies the plaintiffs their day in court, and breaches and impairs the contract and denies due process and equal protection of the laws guaranteed by the Four-

teenth Amendment to the Constitution of the United States. We pray for the granting of the writ of certiorari, for an order and judgment directing the recall of the remittitur and reversal of the judgment of the Supreme Court of California, and for a further order to the court below to enter the judgments for plaintiffs.

The judgment of the Supreme Court of California, below, should be reversed.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

HORACE KALIK
Of LELAND, PLATTNER & KALIK,
Of Counsel.

APPENDIX A.

Opinion of the District Court of Appeal.

[Civ. No. 25341. Second Dist., Div. Two. May 15, 1962.]

Teitelbaum Furs, Inc., et al., Plaintiffs and Appellants, v. The Dominion Insurance Company, Ltd., et al., Defendants and Appellants.

Appeals from a judgment of the Superior Court of Los Angeles County and from an order granting a new trial. A. A. Scott, Judge. Appeal from judgment dismissed; order affirmed.

Action to collect on contracts of insurance for losses arising out of a robbery. Order granting defendants a new trial, affirmed.

Leland, Plattner & Kalik for Plaintiffs and Appellants.

Thomas P. Menzies and James O. White, Jr., for Defendants and Appellants.

Fox, *P.J.*—This is an action by plaintiff corporations to collect upon contracts of insurance for losses arising out of a robbery. Plaintiffs appeal from an order of the superior court granting the defendant insurance companies a new trial after plaintiffs had obtained a jury verdict. The new trial was granted on the ground that the evidence was insufficient to justify the verdict and upon the further ground that irregular proceedings occasioned by plaintiffs, through their attorney, prevented the defendants from having a fair trial.

The defendants have cross-appealed from the judgment entered on the jury verdict in favor of plaintiffs.

Plaintiffs are three corporations engaged in the manufacture and sale of furs, each doing business or storing inventory at 414 North Rodeo Drive, Beverly Hills California. Plaintiffs allege that, on December 27, 1955, four unknown men entered plaintiffs' premises and robbed them of 225 furs of a value of $244,510.90. Testimony on behalf of plaintiffs indicated that one of the four unknown persons entered the store on the evening of December 27 just before 6 o'clock, the closing time. The stranger represented himself as a special agent for an insurance company and desired to speak with plaintiffs' president, Mr. Al Teitelbaum. Several employees and at least one customer were in the store at that time. After engaging Teitelbaum in conversation for approximately one-half hour, during which time the customer and all but one employee left the premises, the "insurance agent" pulled a gun on Teitelbaum and caused him to summon the remaining employee, Mr. Al Stan. At gun point, Teitelbaum was forced to tie up Stan and put him in a closet. According to Teitelbaum's testimony he was also forced to open a rear door admitting three other men. He further testified these men tied his hands and feet to a post in a closet area and the four men together took the merchandise out of the store vault through a rear door. Shortly thereafter Teitelbaum and Stan released their bonds, immediately rang the burglar alarm, and within minutes the police and others arrived.

Before filing the proof of loss, plaintiffs supplied the police and defendants' agents with preliminary estimates of the quantity and description of merchandise thought to be missing. On February 14, 1956, plain-

tiffs' president, Teitelbaum, was arrested by Officer Borders of the Beverly Hills Police Department on charges growing out of the asserted robbery. On or about March 7, 1956, Teitelbaum was indicted by the Los Angeles County Grand Jury for conspiracy to commit grand theft, attempted grand theft, and the presentation and filing of false insurance claims.

In a trial upon the indictment Teitelbaum was convicted and that judgment was sustained on appeal. (*People v. Teitelbaum*, 163 Cal. App. 2d 184 [329 P. 2d 157], hear. den. October 24, 1958; cert. den. by the United States Supreme Court, 359 U. S. 206 [79 S. Ct. 738, 3 L. Ed. 2d 759].)

The defendants denied that any robbery took place.[1]

The general rule in considering a motion for new trial is stated in *Richardson v. Ham*, 44 Cal. 2d 772 [285 P. 2d 269] (p. 775): "'In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence [citations]. In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial [citation],

[1]Defendants, in addition to their denial, alleged that plaintiffs' action was barred by reason of the violation by plaintiffs of the provisions of the insurance policies voiding them and precluding recovery in the case of concealment, misrepresentation, fraud or false swearing. Further, that the action was barred by the failure to commence it within 12 months after discovery of the occurrence giving rise to the claim as required by the policies. Finally, that the action was barred by the conviction of Teitelbaum on the charge heretofore mentioned which concerned the same purported theft and the same insurance claims as were sued upon by plaintiffs in this action.

and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried [citation]. It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' (*Brooks v. Metropolitan Life Ins. Co.*, 27 Cal. 2d 305, 307 [163 P.2d 689].)"

There is no definite, inflexible standard or test to guide the action of a trial judge in granting a new trial; but rather, the law contemplates that he will in every case exercise his sound discretion. And, " 'when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon,' the trial judge will not disturb the verdict 'although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness.' [Citations.] But when his judgment tells him that it is wrong, and that the jury has erred, whether from mistake, prejudice, bias, or other cause, in finding against the fair preponderance of the credible evidence or the basic interests of justice, then he will set the verdict aside. The reason for vesting this large discretion in the trial judge it seems to us is altogether apparent. The judge presiding at a jury trial not only has seen and heard the witnesses, as has the jury, but he comes to the task of weighing the evidence on a motion for a new trial with a specialized experience in separating the wheat of evidence from its chaff.

"In reviewing the trial judge's decision an appellate court is not vested with a de novo right or power such as is possessed and exercised by a trial judge. This for the very good reason that the appellate court does not have before it the witnesses to enable it to judge of their demeanor and credibility. As a consequence it is a long established rule in this state that a trial judge will not be reversed in his ruling on a motion for a new trial, unless it is affirmatively shown or manifestly appears that he has abused the sound discretion confided to him." (*Perry v. Fowler*, 102 Cal. App. 2d 808, 811-812 [229 P. 2d 46].)

Therefore, as was stated in *Yarrow v. State of California*, 53 Cal. 2d 427, 434 [2 Cal. Rptr. 137, 348 P. 2d 687]: "It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse an order granting a new trial on this ground. [Citations.]" (Cited in *White v. Aetna Life Ins. Co.*, *198 Cal.App.2d ....., ... [17 Cal.Rptr. 914].)

The basic question here therefore becomes: Is there substantial evidence to support a contrary judgment? (*Brooks v. Metropolitan Life Ins. Co.*, 27 Cal. 2d 305 [163 P. 2d 68].) While the record arguably supports the jury's verdict, it cannot be held in this case, as a matter of law, that there is no substantial evidence which would support a contrary conclusion.

According to the testimony of Teitelbaum and Stan, the earliest time that the robbery could have occurred was approximately 6:25 p.m., which was the time that Stan was called into the office and had his hands and

*Advance Report Citation: 198 A. C. A. 400, 405.

feet bound by Teitelbaum. The latest possible time at which the robbery could have occurred was 6:46 p.m., the time the A.D.T. alarm button was pressed which recorded the time.

In order to consummate a burglary of 225 furs, a vehicle would be necessary. The approach for such vehicle would naturally be in the alley back of the Teitelbaum shop. By witnesses not connected with plaintiffs, defendants, or the police, it was clearly shown that during the time interval in question there was no truck nor any unusual activity in the alley. There was a meat market which had its rear entrance on the same alley as the Teitelbaum shop. Two meat cutters employed at that market, Roy Barnett and A. J. Hess, both testified that they checked out at 6:21 p.m. as shown by the time clock of the establishment. Barnett testified that he left by the rear exit about three to four minutes after punching out. He passed the Teitelbaum shop as he drove out, but saw no motor vehicles other than those which were usually there, the station wagon and one other car; he observed no one in the alley. He further testified that he always parked in that area, including the evening in question, and that in leaving, it was necessary for him to drive by the back of the Teitelbaum shop. He estimated that four minutes elapsed from the time he left the market, entered his car and drove past the fur shop.

Hess, who accompanied Barnett, also testified that he saw no one in the alley and no trucks in the vicinity of the shop except the station wagon and a passenger car. The testimony of these two witnesses indicates that no robbery occurred during the period from approximately 6:25 p.m. to 6:29 p.m.

Robert Loudon, an employee of the System Auto Parks which abuts on the same alley, checked out at 6:28 p.m. that evening. It took him approximately one to two minutes "for locking up the booth, putting the stuff away." He then went to the service station to wash up and returned to the auto park using the route past the rear of the Teitelbaum store on each occasion. The time consumed by him in going down the alley, washing, and coming back was from six to eight minutes, and at that time he saw no truck or van type vehicle—only an Oldsmobile and a Ford station wagon. (Ann Brodkin, the Teitelbaum bookkeeper, testified that when she left the premises, there were, on the lot, Mr. Stan's car, Mr. Teitelbaum's car and the Teitelbaum station wagon. Loudon further testified that during that time he saw no activity, saw no one carrying furs and heard no sounds. From his testimony the trier of fact would certainly be entitled to conclude that no furs were being stolen during the period of time mentioned by Loudon, i.e., from 6:28 to 6:35 or 6:38 p.m.

Arthur Walge, a witness, arrived on the scene at approximately 6:41 p.m. At that time Walge was chauffeur for the singer, Mario Lanza. Walge testified that he approached the store through the alley and pulled into the parking lot. He could see into the shop because some light bulbs were on and knocked on the door but received no response. He then went to the front of the store, leaving Lanza and the nurse, Esther Collins, in the parking lot. Looking into the showcase window he could see the floor of the store and knocked on the glass but received no response and then walked back to the car. He further testified that when he returned to

the back of the store he saw Lanza beating on the metal door with a palm frond. (This pounding might well have been the noise that Stan testified he heard which made him think that it was safe to come out.) Walge, Lanza and Miss Collins drove around to the front of the shop. Walge parked, went to the window and knocked to attract more attention. He saw Teitelbaum and Stan in the shop. Teitelbaum made a motion which could reasonably be interpreted as meaning "go away." Walge was well known to Teitelbaum.

Since Teitelbaum testified to pushing the alarm button just prior to releasing Stan, the events which occurred prior to the palm frond incident must have occurred prior to the pushing of the alarm. Walge estimated the time between the parking of the car and the palm frond incident at about five minutes. Thus, the robbery did not occur between approximately 6:41 and 6:46 p.m. when the alarm was sounded.

Therefore, according to the testimony of Barnett, Hess, Loudon and Walge, a period of only approximately three to six minutes was left in which the robbery could have taken place, i.e., between 6:35 or 6:38 and 6:41 p.m. Taking into account the brief period of time unaccounted for, the large number of furs assertedly involved and the surrounding circumstances, the trial court could reasonably draw the inference that no robbery took place. Inferences are indirect evidence (Code Civ. Proc., §1957) and, if reasonable, are sufficient to support an order granting a new trial. "Actually, an inference is nothing more nor less than a pertinent deduction drawn from circumstantial evidence; i.e., from evidence which is circumstantial as to

the fact deduced. And circumstantial evidence may outweigh, in convincing force . . . the strongest . . . [Citations] . . . direct evidence. . . ." (*Scott v. Burke*, 39 Cal. 2d 388, 398 [247 P. 2d 313].)

This conclusion that there was no robbery finds further support in the testimony of Officer Borders who was assigned by the Beverly Hills Police Department to investigate the claimed robbery along with his superior, a Captain Huff (who died prior to this trial). Borders testified that on February 14, 1956, in the Beverly Hills Police station one Clifford Vanderwyst (also referred to as Weiss) made certain statements in the presence of Teitelbaum, and further testified to the response given by Teitelbaum when asked whether the statements made by Weiss were true.

In response to questions by Borders, Weiss, in the presence of Teitelbaum, stated that he had met one Woody Wilson in the first part of November through a person known as Billy Layton. Layton had told him that he had a friend who wanted to pull a phoney robbery of a fur store. Wilson told him that he had a friend that "wanted to be taken for insurance . . . that it was a walk-in setup and that no one would get hurt." On November 30th he (Weiss) and Wilson had, pursuant to a prearranged plan made by Layton, gone to plaintiffs' fur store with the understanding that there would be but one employee present, but they were not successful because, when they arrived at the store, the janitor ran for the alarm button, whereupon Wilson and Weiss fled. Wilson contacted him after Christmas, stated that the date would be December 27th and that the janitor had been sent out of town on vacation.

Wilson told him he (Weiss) should go to plaintiffs' store at 10 minutes to 6 o'clock where he would be met by Teitelbaum in the front of the store and that Teitelbaum would carry the ball from thereon. Weiss was instructed to represent himself as an insurance agent and to talk about insurance policies when he went into the store. He went to plaintiffs' store at 10 minutes to 6 p.m. on December 27th and pretended to identify himself as an insurance agent. Teitelbaum talked about fur auctions. Teitelbaum left the office and came back with a large fur coat, whispering that the people up front were getting ready to go, and stating, "They wouldn't lock the vault until he got the coat back." Thereafter a woman employee stuck her head in the door and stated she was leaving for the day. Weiss pointed to his watch and told Teitelbaum that he didn't have time "to take it" as he had been told the alarm went off at 6:30. Teitelbaum replied that it had been set up for 7 o'clock. Immediately thereafter, Teitelbaum called to an employee by the name of Stan and asked if everybody had gone; Stan answered, "Yes." Teitelbaum then called him to come to the door. When Stan arrived, Teitelbaum indicated it was a hold-up and "told him not to start anything as everything was insured and not to get hurt." Weiss directed Teitelbaum to tie Stan's wrists behind him and marched them to a closet where Stan was left on the floor. Weiss and Teitelbaum returned almost to the vault when Teitelbaum directed Weiss to go back and close the door to the closet where they had left Stan. After doing this, he proceeded to the fur vault where Teitelbaum was arranging furs, putting them in different places in the vault. He asked Teitelbaum if he could

help but was told to go back and take a look out the back window; he did this and shortly thereafter Teitelbaum came to where he was standing and took him to the rear door and opened it, told him to go out that way when he left; they then proceeded to a closet and Teitelbaum gave him a wallet containing some money; he asked Teitelbaum how much it contained and he said: "2,500.00 in hundred dollar bills." Weiss asked, "if he was supposed to get more later." Teitelbaum replied. "Yes, when he collected his insurance." Teitelbaum also gave him a watch and told him to put it in his pocket. He then tied up Teitelbaum and left the premises by the rear door.

Officer Borders testified that after this recitation:

"I then directed a question to Mr. Teitelbaum. I said, 'Al, did you hear what this man said?'

"He said, 'Yes.'

"I asked him if it was true or not and he said, 'Yes, it was a stupid thing.'

"I said, 'Do you want to elaborate or tell your story?'

"He said, 'No, I will wait until my attorney gets here.'

"Q. Was that the substance of that conversation? A. That is correct."

This testimony, although hearsay, fully qualifies as an admission, thereby excepting it from the rule excluding hearsay evidence. This testimony, constituting an admission, fortifies the trial court conclusion that no robbery in fact took place.

At the trial plaintiffs were asserting the affirmative on the issue of whether a loss occurred and as to the amount of loss, assuming that a theft did occur, and

thus, had the burden of proving both of said issues. As was stated in *Greiss v. State Investment & Ins. Co.*, 98 Cal. 241, 244 [33 P. 195]: "The policy being a contract of indemnity it was incumbent upon the plaintiff to prove the amount of his loss."

The trial court, in determining whether to grant a new trial, was not obliged to accept the testimony produced on behalf of plaintiffs. If the trial court did not believe the testimony of the witnesses for the plaintiffs, then their burden was not satisfied. As was stated in *Yarrow v. State of California,* 53 Cal. 2d 427 [2 Cal. Rptr. 137, 348 P. 2d 687] (p. 434): "In considering the sufficiency of the evidence on the hearing of a motion for a new trial it is the exclusive province of the trial court to *judge the credibility of the witnesses,* . . ." (Emphasis added.) In the instant case, there are numerous considerations which would justify the trial court in refusing to place credence in the witnesses for plaintiffs.

At the criminal trial, Weiss' testimony was substantially the same as that given by Borders with reference to the admission at the Beverly Hills Police station, i.e., that the robbery was faked and planned by Teitelbaum. This testimony was read into the record in the instant action for the purpose of impeachment only. This would tend to justify the trial court in doubting the credibility of plaintiffs' key witness, Teitelbaum. Furthermore, by reason of Teitelbaum's financial interest in plaintiff corporations,[2] he was obviously interested in the outcome of the case. The trial court was en-

[2]Teitelbaum and his wife were the sole owners of plaintiff corporations.

titled to take this in account in passing on his credibility and the weight to be given his testimony. (*Huth v. Katz*, 30 Cal. 2d 605, 609 [184 P. 2d 521]; *People v. Murrie*, 168 Cal. App. 2d 770, 774 [336 P. 2d 559]; *Tidlund v. Seven Up Bottling Co.*, 154 Cal. App. 2d 663, 666-667 [316 P. 2d 656].) Teitelbaum was further impeached by showing that he had been convicted of a felony, the felony being an attempt to defraud defendants by presenting false claims respecting the very matter involved in this case.

This court must conclude therefore that the trial court in granting a new trial did not abuse its discretion, since the evidence would have supported a contrary verdict. (*Brinkerhoff v. Ferguson*, 107 Cal. App. 2d 175 [236 P. 2d 588].)

There is before us a voluminous amount of additional evidence which the trial court could have taken into account in granting the motion for new trial and which would have tended to support a contrary verdict. However, in view of our conclusions, we do not deem it necessary or practical to enumerate or discuss such evidence.

"The basic difficulty with defendant's argument is that he would have this court reweigh the evidence, and draw inferences contrary to those drawn by the trial court. Under firmly established principles we are not at liberty to do this. [Citations.]" (*People v. Gould*, 111 Cal. App. 2d 1, 8 [243 P. 2d 809].) "The trial judge was in a position to determine the credibility of the witnesses, to weigh the evidence, and to draw the inferences from such evidence as he saw it. It cannot be said that there was any abuse of his discretion under

the circumstances." (*White v. Aetna Life Ins. Co.*, *198 Cal. App. 2d ...., ... [17 Cal. Rptr. 914].)

Since the evidence was sufficient to support the trial court's order granting defendants' motion for a new trial, it is unnecessary to decide whether the order might also be sustained on the ground that irregularity of the proceedings by the adverse party through their attorney prevented the defendants from having a fair trial. (See *Richardson v. Ham*, 44 Cal. 2d 772, 777 [285 P. 2d 269].)

The only point on defendants' cross-appeal from the judgment that merits discussion is that Teitelbaum's conviction in the criminal case is a bar to plaintiffs' recovery on the insurance policies. They rely heavily on the principle of res judicata as stated in *Bernhard v. Bank of America*, 19 Cal. 2d 807 [122 P. 2d 892]. But the cases in this state do not indicate that a criminal conviction is res judicata in a subsequent civil action. (*Risdon v. Yates*, 145 Cal. 210 [78 P. 641]) *Vaughn v. Jonas*, 31 Cal. 2d 586 [191 P. 2d 432]; *Burbank v. McIntyre*, 135 Cal. App. 482 [27 P. 2d 400]; *Balestreiri v. Arques*, 49 Cal. App. 2d 664 [122 P. 2d 277]; *In re Anderson*, 107 Cal. App. 2d 670, 671 [237 P. 2d 720]; *American Fire etc. Service v. Williams*, 171 Cal. App. 2d 397 [340 P. 2d 644]; *People v. One 1950 Pontiac 2-door Coupe*, 193 Cal. App. 2d 216 [13 Cal. Rptr. 916]; 3 Witkin, Cal. Procedure, § 58, p. 1943; 29 Cal. Jur. 2d, Judgments, § 288, pp. 183-184.) That the rule, generally, is the same throughout the United States, see 50 Corpus Juris Secundum, Judgments, section 754b(1), page 269.

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In *Risdon* the court said (p. 213): "[T]he judgment in a criminal suit cannot be used in a civil action to establish the facts on which such judgment rests." Even where "a defendant has *pleaded guilty* in a criminal case the plea and judgment are received in evidence *as an admission, but not as conclusive.*" (Emphasis added.) If a judgment in a criminal case based upon a plea of guilty is "not conclusive," *a fortiori*, a judgment based upon an opinion of a judge or jury, predicated on conflicting evidence, should not be conclusive. Defendants argue that the effect of *Bernhard* is to make a prior criminal conviction a bar to a subsequent civil action based on the same facts. But the Supreme Court in *Vaughn v. Jonas, supra*, 31 Cal. 2d 586 (decided six years after *Bernhard*) again reiterated the *Risdon* principle, pointing out also (p. 595) that even a conviction based upon a plea of guilty (as was the fact in the *Vaughn* case) is not held by the courts "to be factually conclusive." In *People v. One 1950 Pontiac 2-door Coupe, supra*, the court quoted with approval from *In re Anderson, supra*, "that judgments in criminal prosecutions are neither bars to subsequent civil proceedings founded upon the same facts nor proof of anything in such civil proceedings. . . ." In *American Fire etc. Service v. Williams, supra*, 171 Cal. App. 2d 397, the opinion pointed out (p. 401) that "the trial court proceeded on the theory that the record made on the contempt citation not only was inadmissible in this civil action for damages, but that it could not be treated as an estoppel, or collateral estoppel, or conclusive adjudication upon the issue whether or not the respondents had violated the injunction." The court then stated: "We agree with that view. The well-established rule

which makes inadmissible a conviction of a criminal offense as proof of the facts upon which the conviction was based is the rule which must be applied here." However, in the instant case, Teitelbaum's conviction was admissible for the purpose of impeachment. (Code Civ. Proc., § 2051.)

While there are a few cases in the United States representing a minority view (McCormick, Evidence (1954), § 295, pp. 618-619; 50 C.J.S., Judgments, § 754(1), p. 269) to the effect that a prior conviction is a bar to a civil action based on the same facts, this is not the position of the California courts.

The other points raised in the cross-appeal need not be discussed since the affirmance of the order granting the motion for a new trial leaves no final judgment in effect. The cross-appeal from the judgment is only operative if the order granting the motion for a new trial is reversed. (See *White v. Aetna Life Ins. Co.*, *198 Cal. App. 2d ...., ... [17 Cal. Rptr. 914]; *Freeman v. LaMorte*, 148 Cal. App. 2d 670, 675 [307 P. 2d 734].) Upon affirmance of the order granting a new trial, the appeal from the judgment becomes moot and therefore should be dismissed.

The order granting the new trial is affirmed.

The cross-appeal from the judgment is dismissed.

Herndon, J., concurred.

Ashburn, J., Concurring and Dissenting.—I agree with that portion of the majority opinion which discusses the order granting a new trial. But I think defendants' cross-appeal requires different treatment

*Advance Report Citation: 198 A. C. A. 400, 408.

and that the judgment should be reversed with instructions to the trial court to grant the motion for judgment notwithstanding the verdict and to enter such judgment in favor of defendants; this being done, the appeal from the order granting a new trial should be treated as moot and dismissed. As to procedure see *Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 418, 441 [313 P. 2d 936].) Such is the relief asked by cross-appellants.

This difference of views turns upon the question of whether the conviction of Teitelbaum in the criminal case operates as res judicata in this civil action which is based upon the same fraud as the one of which he was convicted. In my opinion it is a conclusive adjudication of the basic facts involved in each proceeding, criminal and civil, and hence a bar to the present action. This point has been urged by cross-appellants at each stage of the case including their motion for directed verdict and their motion for judgment notwithstanding the verdict. The fact of the conviction was not proved for the limited purpose of impeachment of Teitelbaum but as affirmative and conclusive evidence of the controlling facts at bar.

Though there are a number of cases in this state which announce as a general rule the proposition that a criminal conviction cannot be used as proof of the same facts in a subsequent civil proceeding, they rest in the main upon want of mutuality or identity of parties. That supposed element of res judicata has been rejected in this state as a matter of public policy; this was done in *Bernhard v. Bank of America*, 19 Cal. 2d 807, 811-813 [122 P. 2d 892], decided March

6, 1942 (see discussion of this ruling in *Navarov v. Caldwell*, 161 Cal. App. 2d 762, 769, 774-775 [327 P. 2d 111]).

It seems well settled that the principles of res judicata familiarly applied in civil litigation also prevail on the criminal side (*People v. Beltran*, 94 Cal. App. 2d 197, 203 [210 P. 2d 238]; *People v. Majado*, 22 Cal. App. 2d 323, 326 [70 P. 2d 1015]; *Meyer v. Board of Medical Examiners*, 34 Cal. 2d 62, 67 [206 P. 2d 1085]; *People v. Joseph*, 153 Cal. App. 2d 548, 551 [314 P. 2d 1004]; *United States v. Rangel-Perez*, 179 F. Supp. 619, 625, 627; *Sealfon v. United States*, 332 U. S. 575, 578 [68 S. Ct. 237, 92 L. Ed. 180, 184]; *United States v. Oppenheimer*, 242 U. S. 85, 88 [37 S. Ct. 68, 61 L. Ed. 161, 164, 3 A. L. R. 516]; 50 C.J.S., § 754, p. 267). The authorities just cited deal with the application of res judicata to succeeding criminal proceedings but there is no logical inhibition upon using the *conviction* as conclusive evidence in a later civil case where the convicted person seeks to capitalize upon his own crime —that is our case.

Lack of mutuality is the chief ground upon which exclusion of such proof is usually justified. That supposed essential of res judicata no longer exists in California in civil cases and I see no good reason why the *Bernhard* doctrine should not be extended to this situation, permitting the use of a conviction against the party who was in the criminal trial. As shown by *Bernhard* the question is one involving public policy and certainly there should be no such policy consideration which would permit a criminal to try de novo a question which has been ruled against him beyond a

reasonable doubt and unanimously, as is the case in a criminal proceeding. Without advancing these exact reasons several high courts have reached the conclusion just suggested.

Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82 [140 S. E. 314, 57 A. L. R. 490], seems to be the leading case in this narrow field of discussion. Heller had been convicted of burning a stock of goods with intent to defraud the insurer; later he sued to recover on the policy for the loss of the goods. Holding that the judgment of conviction was a bar to the maintenance of a civil action the court said, in part: "This is a case in which a rigid adherence to a general rule and to some judicial expressions would be a reproach to the administration of justice. . . . . That there are numerous cases in which it has been unequivocally stated that records in criminal cases are not admissible evidence in civil cases involving substantially the same issues is undoubtedly true." (P. 315 [140 S. E.].) 2 Freeman on Judgments, section 653, is quoted as follows: "'The chief reason for excluding the record of a criminal prosecution from evidence in a civil case is that the parties to the two proceedings are different. . . . While the difference in parties and lack of mutuality are a logical and sufficent reason in most cases for this general rule, other reasons given are the different rules of evidence and procedure which prevail in civil and criminal cases and the differing degrees of proof required.'" (Pp. 315-316 [140 S. E.].) The court continues: "It is certainly clear in such cases that the plaintiff who is seeking redress in the civil case for the injury, not having been a party to the criminal prosecution, is not bound by its result. We

confess our inability to perceive, however, why the accused person himself should not be held either as bound or affected by the result of the prosecution, if adverse to him. He has had his day in court, with the opportunity to produce his witnesses, to examine and cross-examine the witnesses for the prosecution, and to appeal from the judgment. So that the chief reason for holding that the plaintiff in the civil case is not bound by the prosecution fails as to the defendant, who has once litigated the identical question and had it adversely decided, under conditions most favorable to himself—that is, in a prosecution in which he could not have been convicted unless the decisive fact, his guilt, had been shown beyond a reasonable doubt. These views are not novel, even if contrary to the general trend of decision, because all of the precedents on the subject are not consistent with the general rule which Mr. Freeman has stated. There are, as he shows, exceptions, limitations, and contrary decisions." (P. 316 [140 S. E.].) "The vital question—that is, whether or not the plaintiff, Heller, fraudulently destroyed, or connived at the destruction of, his own property for the purpose of securing the insurance—is identical with that which was heard and determined in the criminal prosecution against Heller, and while not res judicata, as against the insurance company, no sound reason is perceived why the plaintiff, Heller, should be permitted to reopen it and to avoid the legal effect of that judgment by such a collateral attack upon it. It is clear that if he can succeed in this action, he thereby avoids the logical consequences of his conviction. Like other judgments, a judgment in a criminal case cannot be attacked collaterally." (P. 319 [140 S. E.].) Here is

the *Bernhard* philosophy applied to a situation exactly like the one before us.

Austin v. United States (7th Cir. 1942) 125 F. 2d 816. Beneficiary of policy of insurance sued to recover thereon but was confronted with plea that she had murdered insured and been convicted of the crime and hence was barred from maintaining an action on the policy. The court upheld this contention, saying at page 818: "The rigid rule of exclusion of judgments in criminal cases as evidence in civil cases involving the same facts has been relaxed in recent years by some courts in particular cases. Thus where a party to a civil case has previously been convicted in a criminal case of a crime relating to the same factual situation which is in issue in the civil case, it has sometimes been held that the record of his conviction is admissible against him, on the ground of estoppel." At page 819: "In our case the defendant's answer and the intervenor's petition set up the judgment which resulted in plaintiff's conviction of the murder of the insured. That judgment imported verity and could not be collaterally contradicted. *Burt v. Union Central Life Ins. Co.* and *Diamond v. New York Life Ins. Co., supra.* We think no error was committed in holding the judgment was conclusive upon the plaintiff. . . . That there is a well established public policy against payment of insurance to the murderer of the insured is beyond question. Our laws will not reward one for the commission of crime, and whenever the effect of the enforcement of a right which one would otherwise have, would be to give her an advantage by reason of her felonious act, the courts will decline to entertain it because it is contrary to the good order of society, and

an encouragement to crime to allow a beneficiary who murders the insured to receive the benefits of the insurance."

Mineo v. Eureka Security Fire & Marine Ins. Co., 182 Pa. Super. 75 [125 A. 2d 612]. "We are faced here with the question of whether this Court should permit recovery from insurance companies for a fire loss, when this Court has already held that the insureds were properly convicted of procuring the burning of the property for which recovery is sought." (P. 613 [125 A. 2d].) "The common law principle that a person will not be permitted to benefit by his own wrong, particularly by his own crime, prevents the insured from recovering on insurance policies for loss caused by his crime. [Citations.] This principle is generally accepted by the courts, but there is disagreement among the jurisdictions concerning the evidence necessary in a civil action to establish the fact of the insured's criminal responsibility for the damage, and whether the conviction is a bar to bringing the action." (P. 615 [125 A. 2d].) "The tendency is to abandon any general rule of exclusion applicable to all criminal judgments, and to approach the problem from the point of view of the particular judgment of conviction, so that the rule as to the admissibility of a beneficiary's conviction for the murder of the insured in an action on an insurance policy may differ from that as to the conviction for a traffic violation in a negligence action, or the conviction of a defendant for assault and battery in a civil action. We think the lower court committed no error in admitting into evidence the criminal record of the insureds' conviction of setting the fire which caused the damage for which recovery is sought. We, however,

are of the opinion that the conviction of the insureds is a bar to recovery, and that judgment non obstante veredicto should be granted." (P. 616 [125 A. 2d].) "We recognize that our holding is contrary to the more generally accepted rule throughout the country. See 50 C.J.S., Judgments, § 743. We believe, however, that reason can lead to no other conclusion and that we should not ignore it in order to follow a rule for which we can find no convincing logic." (Pp. 616-617 [125 A. 2d].) "To now permit them to recover for the loss which they have been convicted of fraudulently causing would be against public policy. It would tend to destroy the confidence of the public in the efficiency of the courts; it would stir up litigation that would reopen tried issues; it would impress the public with the belief that the results of trials of the gravest nature were so uncertain that the innocent could not escape condemnation; and it would convince the public that the courts themselves have no confidence in the judicial processes. We are of the opinion that when one is convicted of a felony and subsequently attempts to benefit from the commission, the record of his guilt should be a bar to his recovery." (P. 618 [125 A. 2d].)

The same result was reached by this division of this court in *Meyer v. Johnson*, 115 Cal. App. 646, 650 [2 P. 2d 456].

Emich Motors Corp. v. General Motors Corp., 340 U. S. 558 [71 S. Ct. 408, 95 L. Ed. 534]. This case was governed by section 5 of the Clayton Act which makes conviction of violation of the Antitrust Law prima facie evidence in a later civil suit by an individual who has been injured thereby. That fact impairs its

authority at bar but the opinion states the following general rules: "As this Court has observed, that 'principle [estoppel] is as applicable to the decisions of criminal courts as to those of civil jurisdiction.' *Frank v. Mangum*, 237 U. S. 309, 334 [59 L. Ed. 969, 983, 35 S. Ct. 582] (1915); *Sealfon v. United States*, 332 U. S. 575, 578 [92 L. Ed. 180, 183, 68 S. Ct. 237] (1948). It is well established that a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding." (P. 568.)

Among other cases cited in *Emich Motors, supra*, is Local *167, I.B.T.C. v. United States*, 291 U. S. 293 [54 S. Ct. 396, 78 L. Ed. 804]. In that case, after conviction of conspiracy to violate the Sherman Act the defendants were sued by the government for an injunction against pursuing that same conspiracy; section 5 of the Clayton Act was not involved. The court held: "The judgment in the criminal case conclusively established in favor of the United States and against those who were found guilty that within the period covered by the indictment the latter were parties to the conspiracy charged. The complaint in this suit includes the allegations on which that prosecution was based. The defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties. And, to the extent that the answers attempted to deny participation of convicted defendants in the conspiracy of which they had been found guilty, they are false and sham and the district court rightly so treated them." (Pp. 298-299.)

Volume 65, Harvard Law Review, 879: "Where the criminal prosecution results in a conviction, that judg-

ment has properly been held conclusive of the issues therein decided for the purposes of the civil action regardless of the remedial or penal nature of that action, since the issues have been determined once under a greater degree of proof."

See also, Note entitled "Doctrine of Res Judicata in Criminal Cases" in 147 American Law Reports 991, at page 996; also, *The Admissibility of Criminal Convictions in Subsequent Civil Proceedings*, 40 California Law Review 225.

The foregoing authorities establish, I think, that lack of mutuality is no impediment to using a conviction of crime as a bar to recovery of benefits growing out of that crime. The difference in quantum of proof required in criminal and civil cases is not persuasive to the contrary, in a situation such as the one at bar; where a defendant has been unanimously convicted by evidence showing beyond a reasonable doubt that he committed a crime he cannot be heard to complain of proof of that judgment against him in a civil case because the rules of preponderance of evidence and of nine to three verdicts prevail there. "In the typical case collateral estoppel does not apply because the parties to the two actions are not identical, and because different degrees of proof are required in the two proceedings. These objections seem invalid, however, where a criminal conviction is introduced in a civil action, since a greater degree of proof has been overcome in determining the issue involved and the party bound has had an opportunity to litigate the issue." (65 Harv. L. Rev. 878.)

So far as different rules of evidence and procedure are concerned they are of little consequence. Penal

Code Section 1102 provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." *People v. Murphy*, 45 Cal. 137, 144: "The general rules of evidence when observed, and the relaxations of those rules when permitted, are ordinarily the same, whether the particular case be civil or criminal in its character."

It is recognized, of course, that a number of California cases have stated that a criminal conviction cannot be used as proof of anything in a civil case, but most such cases preceded the *Bernhard* case in point of time and those which came later do not consider *Bernhard* in connection with the exact problem before us. The cases cited in the majority opinion are deemed representative. Lack of mutuality was assigned as the basis for exclusion in the following cases: *Risdon v. Yates*, 145 Cal. 210 [78 P. 641]; *Balestreiri v. Arques*, 49 Cal. App. 2d 664 [122 P. 2d 277]; *American Fire etc. Service v. Williams*, 171 Cal. App. 2d 397 [340 P. 2d 644]. *Vaughn v. Jones*, 31 Cal. 2d 586 [191 P. 2d 432], deals with a plea of guilty, not a conviction based upon proof. *Burbank v. McIntyre*, 135 Cal. App. 482 [27 P. 2d 400], does not assign any reasons for the rule. *In re Anderson*, 107 Cal. App. 2d 670 [237 P. 2d 720], involves an acquittal, as does *People v. One 1950 Pontiac 2-door Coupe*, 193 Cal. App. 2d [illegible] [13 Cal. Rptr. 916]. To me it seems that none of these cases when read in light of the *Bernhard* doctrine is opposed to the views herein expressed. To state it another way, they are qualified by Bernhard and thus fall in line with the reasoning above set forth.

I would reverse the judgment and grant the other relief mentioned in the first paragraph of this opinion.

APPENDIX B.

Opinion of the Supreme Court of California.

[L. A. No. 26913. In Bank. Oct. 25, 1962.]

Teitelbaum Furs, Inc., et al., Plaintiffs and Appellants, v. The Dominion Insurance Company, Ltd., et al., Defendants and Appellants.

[On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 25341 (203 A.C.A. 589, 21 Cal. Rptr. 671) dismissing appeal from judgment and affirming order of the superior court. Judgment and order reversed with directions.]

Appeals from a judgment of the Superior Court of Los Angeles County and from an order granting a new trial. A. A. Scott, Judge. Reversed with directions.

Action to recover under contracts of insurance for losses allegedly arising out of a robbery. Judgment for plaintiffs notwithstanding the verdict for defendants and order granting defendants a new trial, reversed with directions.

Leland, Plattner & Kalik and Horace L. Kalik for Plaintiffs and Appellants.

Thomas P. Menzies and James O. White, Jr., for Defendants and Appellants.

Traynor, J.—Alleging losses by robbery, plaintiff corporations brought this action to recover $244,510.90 under contracts of insurance with defendant insurers. The jury returned a verdict for plaintiffs, and the trial court granted defendants' motion for new trial on the ground that the evidence was insufficient to support

the verdict. The trial court denied defendants' motion for judgment notwithstanding the verdict. Plaintiffs appeal from the order granting a new trial. Defendants appeal from the judgment.

We agree with defendants' contention that their plea of collateral estoppel defeats plaintiffs' action. In a criminal action that became final before the present action was commenced, Albert Teitelbaum, president of plaintiff corporations, was convicted of conspiracy to commit grand theft, attempted grand theft, and the filing of a false and fraudulent insurance claim. The conviction was affirmed on appeal. (*People v. Teitelbaum*, 163 Cal. App. 2d 184 [329 P. 2d 157], petition for hearing denied Oct. 22, 1958, cert. den., 359 U. S. 206 [79 S. Ct. 738, 3 L. Ed. 759].) Plaintiff corporations concede that the claim in this case is for the same loss involved in the criminal conviction and that they are mere *alter egos* of Teitelbaum. The issue adjudicated adversely to plaintiffs in the criminal action is identical with the issue in this action: whether the alleged robbery occurred as plaintiffs contend or whether it was staged by Teitelbaum as defendants contend. By its verdict, the previous jury necessarily found against plaintiffs on this issue.*

The doctrine of res judicata has a double aspect: (1) it "precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction." (2) "Any issue

*Petitioners' footnote: The jury in this case found for plaintiffs on this issue. The jury found that a robbery occurred, also it necessarily found that the criminal prosecution was brought to defeat the civil claims under the policies, but that the defendants had breached the terms of their paid up policies of insurance and should pay the full amount claimed.

necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action." (*Bernhard v. Bank of America*, 19 Cal. 2d 807, 810 [122 P. 2d 892]; see *Taylor v. Hawkinson*, 47 Cal. 2d 893, 895-896 [306 P. 2d 797].) In the present case, since plaintiffs' cause of action is different from that of the state in the criminal proceeding, we are concerned with the latter aspect, often termed collateral estoppel.

In the *Bernhard* case, *supra*, this court rejected the doctrine of mutuality of estoppel that had been applied to limit the scope of collateral estoppel, and held three questions to be pertinent in determining the validity of the plea. "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (19 Cal. 2d at p. 813.) The record in the present case provides affirmative answers to each of these questions.

Notwithstanding the apparent applicability of collateral estoppel, it is contended that the cases in this state do not indicate that a criminal conviction is conclusive in a subsequent civil action. Additionally, plaintiffs urge that the plea be rejected on the ground that since plaintiffs did not have the initiative in the criminal action and since Teitelbaum chose not to testify and was unable to utilize an important witness in the criminal proceeding, they did not have a full and complete day in court on the issue now sought to be foreclosed against them.

The cases do not preclude the application of collateral estoppel in a civil case to issues determined in a previous criminal prosecution. Those relied upon for the contrary proposition are either based upon the doctrine of mutuality of estoppel (*Risdon v. Yates*, 145 Cal. 210 [78 P. 641]; *Burbank v. McIntyre*, 135 Cal. App. 482 [27 P. 2d 400]; *Balestreiri v. Arques*, 49 Cal. App. 2d 664 [122 P. 2d 277]; *American Fire etc. Service v. Williams*, 171 Cal. App. 2d 397 [340 P. 2d 644]) or involve a prior acquittal (*In re Anderson*, 107 Cal. App. 2d 670 [237 P. 2d 720]; *People v. One 1950 Pontiac 2-Door Coupe*, 193 Cal. App. 2d 216 [13 Cal. Rptr. 916]) or involve the admissibility as an admission in a civil suit of a plea of guilty in a previous criminal action (*Vaughn v. Jonas*, 31 Cal. 2d 586 [191 P. 2d 432]).

Since the requirement of mutuality of estoppel was expressly abandoned in the *Bernhard* case, *Risdon v. Yates, supra*, and the cases following it are no longer authoritative.

In re Anderson, supra, rejected the plea as applied to a former acquittal on the ground that "'the difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'" (107 Cal. App. 2d 670, 672; see *Helvering v. Mitchell*, 303 U. S. 391, 397 [58 S. Ct. 630, 82 L. Ed. 917]; Annot. 18 A. L. R. 2d 1287, 1315.)

A plea of guilty is admissible in a subsequent civil action on the independent ground that it is an admis-

sion. It would not serve the policy underlying collateral estoppel, however, to make such a plea conclusive. "The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (*Bernhard v. Bank of America*, 19 Cal. 2d 807, 811 [122 P. 2d 892].) "This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case." (*Jorgensen v. Jorgensen*, 32 Cal. 2d 13, 18 [193 P. 2d 728].) When a plea of guilty has been entered in the prior action, no issues have been "drawn into controversy" by a "full presentation" of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice (see *Vaughn v. Jonas*, 31 Cal. 2d 586, 594 [191 P. 2d 432]) combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action.

Collateral estoppel applies to successive criminal trials (*People v. Beltran*, 94 Cal. App. 2d 197, 203 [210 P. 2d 238]; *People v. Majado*, 22 Cal. App. 2d 323, 326 [70 P. 2d 1015]; see *People v. Joseph*, 153 Cal. App. 2d 548, 551 [314 P. 2d 100]; *Scalfon v. United States*, 332 U. S. 575, 578 [68 S. Ct. 237, 92 L. Ed. 180]; Annot. 147 A. L. R. 991, 992) and, although not widely adopted, has been applied in the better reasoned cases that have dealt with the problem here presented. (*Eagle etc. Ins. Co. v. Heller*, 149 Va. 82 [140 S. E.

314, 57 A. L. R. 490]; *Minco v. Eureka etc. Ins. Co.*, 182 Pa. Super. 75 [125 A. 2d 612]; *Austin v. United States*, 125 F. 2d 816; see 25 So. Cal. L. Rev. 480; 40 Cal. L. Rev. 225; 50 Yale L. J. 499.) Thus it is significant that this court found support in *Eagle etc. Ins. Co. v. Heller, supra*, in reaching its decision to abandon the requirement of mutuality of estoppel in the *Bernhard* case. To preclude a civil litigant from relitigating an issue previously found against him in a criminal prosecution is less severe than to preclude him from relitigating such an issue in successive civil trials, for there are rigorous safeguards against unjust conviction, including the requirements of proof beyond a reasonable doubt (Code Civ. Proc., §2061) and of a unanimous verdict (Pen. Code, §1164), the right to counsel (*In re James*, 38 Cal. 2d 302 [240 P. 2d 596]), and a record paid for by the state on appeal (Cal. Rules of Court, rule 33*). Stability of judgments and expeditious trials are served and no injustice done, when criminal defendants are estopped from relitigating issues determined in conformity with these safeguards.

Plaintiffs contend, however, that in the absence of mutuality, collateral estoppel ought not be applied against a party who did not have the initiative in the previous action. (See *Nevarov v. Caldwell*, 161 Cal. App. 2d 762 [327 P. 2d 111]; Currie, Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281, 313.) Although plaintiffs' president did not have the initiative in his criminal trial, he was afforded a full opportunity to litigate the issue of his guilt with all the safeguards afforded the

*Formerly Rules on Appeal rule 33.

criminal defendant, and since he was charged with felonies punishable in the state prison (Pen. Code, §17), he had every motive to make as vigorous and effective a defense as possible. Under these circumstances, we hold that any issue necessarily decided in a prior criminal proceeding is conclusively determined as to the parties if it is involved in a subsequent civil action.

It should be noted, however, that a criminal judgment that is subject to collateral attack on the ground, for example, that it was obtained through the knowing use of perjured testimony (*Mooney v. Holohan*, 294 U. S. 103 [55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406]; *Alcorta v. Texas*, 355 U. S. 28 [78 S. Ct. 103, 2 L. Ed. 2d 9]) or suppression of evidence (*People v. Carter*, 48 Cal. 2d 737, 747 [312 P. 2d 665]), or that has in effect been set aside by a pardon based on the defendant's innocence (see Pen. Code, §4900), is not res judicata in a subsequent action. (See Rest., Judgments, §11.) Plaintiffs have advanced no grounds that would sustain a collateral attack on the judgments, but they contend that there are special reasons why collateral estoppel should not apply in this case. They point out that Teitelbaum chose not to take the stand in the criminal prosecution except for the limited purpose of denying an alleged admission, and contend that he was unable to secure the testimony of an alleged co-conspirator.

Teitelbaum's election not to testify in his own behalf in the criminal case was presumably made on the assumption that he would benefit thereby.* His error, if

*Petitioners footnote: The law of the State of California, as it then existed, entitled him to believe that standing on his constitutional rights not to testify, would not affect the rights of

any, in trial strategy would no more defeat the plea of collateral estoppel than the failure of a litigant to introduce relevant available evidence in any other situation.

Teitelbaum urged his inability to compel the testimony of the alleged co-conspirator on his appeal from the judgment in the criminal case, and it was determined that it did not warrant a reversal. *A fortiori*, it will not sustain a collateral attack upon the criminal judgment.

The order denying defendants' motion for judgment notwithstanding the verdict and the order granting a new trial are reversed and the trial court is directed to enter judgment for defendants. Defendants shall recover their costs on these appeals.

Gibson, *C. J.*, McComb, *J.*, Peters, *J.*, White, *J.*, and Tobriner, *J.*, concurred.

Schauer, *J.*, concurred in the judgment.

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the corporations to have their day in court on the breach of contract and civil liabilty. (See the law of California prior to this decision, as set out in the opinion of the District Court of Appeal, Appendix A.)

APPENDIX C.

Statutes Involved.

Article I, Section 10, Constitution of the United States:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. . . ."

Fourteenth Amendment to the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

Section 182, Penal Code of California:

"If two or more persons conspire:

1. To commit any crime.

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

3. Falsely to move or maintain any suit, action or proceeding.

4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.

5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

6. To commit any crime against the person of the President or Vice President of the United States, the governor of any state or territory, any United States Justice or Judge, or the secretary of any of the executive departments of the United States.

They are punishable as follows:

When they conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for not less than 10 years.

When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punish-

ment for conspiracy to commit such felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree.

If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both.

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done."

Section 484, Penal Code of California:

"Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains

credit and thereby fraudulently gets or obtains possession or money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud."

Section 556, Insurance Code of the State of California:

"False or fraudulent claim; penalty. It is unlawful to:

"(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

"(b) Prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim.

"Every person who violates any provision of this section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both."

Section 300, Corporations Code of California:

"Formation of corporation. A corporation may be formed under this division for any lawful purposes by the execution of articles of incorporation by three or more persons, and the filing of the articles in the manner provided in this chapter."

Section 800, Corporations Code of California:

"Powers of directors. Subject to limitations of the articles and of this division as to action which shall be authorized or approved by the shareholders, all corporate powers shall be exercised by or under authority of, and the business and affairs of every corporation shall be controlled by, a board of not less than three directors."

Section 1908, Code of Civil Procedure of the State of California:

"Judgment or final order; effect; conclusiveness

"The effect of a judgment or final order in an action or special proceeding before a Court or Judge of this State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

"One—In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or

legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

"Two—In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

Section 1909, Code of Civil Procedure of the State of California:

"Judicial orders; disputable presumption

"Effect of other judicial orders, when conclusive. Other judicial orders of a Court or Judge of this State, or of the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity."

Section 1910, Code of Civil Procedure of the State of California:

"Parties; when deemed to be the same

"Where parties are to be deemed the same. The parties are deemed to be the same when those between whom the evidence is offered were on op-

posite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either."

Rule 25(d), Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California:

"(d) Recall of Remittitur. A remittitur may be recalled by order of the reviewing court on its own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion."

Rule 26(b), Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California:

"(b) Entry of Judgment for Costs. In any case in which the reviewing court directs the manner in which costs shall be awarded or denied, the clerk shall enter on the record and insert in the remittitur a judgment in accordance with such directions. In the absence of such directions by the reviewing court the clerk shall enter on the record and insert in the remittitur a judgment for costs as follows: (1) In the case of a general and unqualified affirmance of the judgment, for the respondent; (2) in the case of a dismissal of the appeal, for the respondent; (3) in the case of a modification of the judgment, for the appellant; and (4) in the case of a reversal of the judgment, in whole or in part, with or without directions, for the appellant. In any case where the clerk fails

to enter judgment for costs as provided in this subdivision, the reviewing court, on motion made not later than 30 days after issuance of the remittitur, or on its own motion, may recall it for correction."

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IN THE

Supreme Court of the United States

October Term, 1962

No. 852

TEITELBAUM FURS, INC., a California corporation; TEITELBAUM FURS, INC., a New York corporation; TEITELBAUM FURS OF PALM SPRINGS, INC., a California corporation,

Petitioners,

vs.

AMERICAN HOME INSURANCE COMPANY, a corporation; CALEDONIAN INSURANCE COMPANY, a corporation; CERTAIN UNDERWRITERS AT LLOYD'S LONDON subscribing to Certificate LA 3539/RC 45820; THE DOMINION INSURANCE COMPANY, LTD.; THE LONDON AND EDINBURGH INSURANCE COMPANY, LTD.; ANGLO-SAXON INSURANCE ASSOCIATION, LTD.; THE WORLD'S MARINE AND GENERAL INSURANCE COMPANY, LTD.; THE ROYAL SCOTTISH INSURANCE COMPANY, LTD.; TRENT INSURANCE COMPANY, LTD.; ST. HELENS INSURANCE COMPANY, LTD.; EXCESS INSURANCE COMPANY, LTD.; THE WORLD AUXILIARY INSURANCE COMPANY, LTD.; ENGLISH AND AMERICAN INSURANCE COMPANY, LTD.,

Defendants and Respondents,

TEITELBAUM FURS, INC., a California corporation; TEITELBAUM FURS, INC., a New York corporation; TEITELBAUM FURS OF PALM SPRINGS, INC., a California corporation,

Petitioners and Respondents on the Cross-Appeal.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioners and Respondents on the Cross-Appeal.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners Failed to Raise Any Federal Question in the Court of First Instance or Properly to Raise Any Federal Question in the California District Court of Appeal or Supreme Court.

At no time from the commencement of plaintiffs' action on January 18, 1957 until *after* the Opinion of the

California Supreme Court became final and its remittitur had issued on November 26, 1962, did plaintiffs-petitioners ever suggest that there was a federal question involved in this case. Supreme Court Rules, Rule 23-1-(f), requires respecting the petition for certiorari in part as follows:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error), and the way in which they were passed upon by the court; * * *."

The record shows that the petitioners did not present any federal question to the court of first instance, nor did the petitioners present any federal question in the regular course of appeal to any California appellate court nor does the record disclose that any California court passed upon any Federal question.

At the time petitioners' action was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, Albert Teitelbaum had been convicted of conspiracy to commit grand theft, attempted grant theft and filing of false and fraudulent insurance claims concerning the same purported thefts and the same insurance claims as those sued upon by petitioners [Rep. Tr. p. 2060, line 8, to p. 2067, line 17], but the conviction was not as yet final. Thereafter, when the conviction became final, the respondent-defendants brought on a motion in the Superior Court to amend

their answer, setting forth the finality of the said conviction, the privity of Albert Teitelbaum with the corporate plaintiffs by reason of the corporations being Teitelbaum's *alter egos*, and urging said conviction as a bar to plaintiffs' action. The amendment was allowed by the Superior Court and was filed December 8, 1958 [Clk. Tr. pp. 34-36].

The plaintiffs-petitioners have failed to include in their transcript, certified to this Court, the motion of the defendants to be permitted to file said amendment, nor have they included the plaintiffs' opposition thereto. It was at that point, in opposing the proposition that Mr. Teitelbaum's conviction should be a bar to collection by the corporations, that any constitutional question which plaintiffs may have felt existed could have been raised. It was not raised at that point. Not only did the plaintiffs fail to urge any federal constitutional question when the defendants first set forth Mr. Teitelbaum's conviction as a bar to his action, but did not mention it at trial and did not mention it in any of the appellate briefs to the California District Court of Appeal or the California Supreme Court (see Tables of Authorities and Indices to said briefs, wherein the Federal Constitution is no where mentioned). To the contrary, the first mention of any claimed federal question is contained in a "Motion to Recall Remittitur", filed by plaintiffs after the judgment of the California Supreme Court had become final.*

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*California Rules on Appeal, Rule 24(a), provides, in part: "A decision of the Supreme Court becomes final 30 days after filing unless prior to the expiration of said 30 day period either a shorter time, or an additional period of time not to exceed 30 days, is ordered by the court."

Under California procedure a motion to recall a remittitur is not a part of the regular appellate processes but rather is an extremely limited and extraordinary remedy.[1] It is not a part of the limited office of such a motion to raise points which could have been but were not raised at trial or during the regular appellate proceedings. This Honorable Supreme Court had occasion to consider its power to grant certiorari after the presentation of a question on a motion to recall remittitur, in the case of *Edelman v. People of the State of California*, 73 S. Ct. 293, 344 U. S. 357, 97 L. Ed. 387, where it was held that the Supreme Court is without power to decide whether constitutional rights have been violated when federal questions were not seasonably raised in accordance with the requirements of state law. There the Supreme Court stated:

> "Petitioner contends, first, that his conviction violates the Due Process Clause of the Fourteenth Amendment because the vagrancy statute is vague, indefinite and uncertain. The record indicates that this defense was not raised on trial but was presented for the first time as the fifth of petitioner's grounds of appeal, stated as follows: '5. Vagrancy statute is unconstitutional because vague and indefinite'.
>
> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of

[1] The decision of the California Supreme Court was filed Oct. 25, 1962 and thus became final Nov. 24, 1962, since there was no contrary order by the court. Petitioners' Motion to Recall Remittitur was not filed until Dec. 18.

state law. Hulbert v. Chicago, 202 US 275, 50 L ed 1026, 26 S Ct 617 (1906); Mutual Life Ins. Co. v. McGrew, 188 US 291, 308, 47 L ed 480, 484, 23 S Ct 375, 63 LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below." (344 U. S. at pp. 358, 359, 97 L. Ed. at pp. 390, 391).

Further, in the *Edelman* case, the Supreme Court specifically remarked on the California rules respecting a motion to recall remittitur, stating:

> "Further, the motion sought what, under California law, is an extraordinary remedy, not available where the court had jurisdiction to render the judgment complained of and it does not affirmatively appear that it was the result of fraud, imposition or misapprehension of facts." People v. Stone, 93 Cal App 2d 858, 861, 210 P 2d 78, 80 (1949) and cases there cited; 23 Cal L Rev 354." (344 U. S. at p. 361, 97 L. Ed. at p. 392).

The attempt of petitioners to present a constitutional question to the California Supreme Court by their motion to recall the remittitur was evidently done in desperation, in full realization that no constitutional question had ever been raised previously in either the trial court or any California appellate court. Under these circumstances the comment of the California District Court of Appeal in *Davis v. Basalt Rock Co.*, 114 Cal. App. 2d 300, 250 P. 2d 254, 260 (hearing denied), is pertinent:

> "To permit movants to have the remittitur recalled for this reason would be to permit litigants to

present the merits of an appeal piecemeal. That cannot be done. There was ample opportunity to present the issue of survivability squarely. This was not done—not even on petition for rehearing here, nor on petition for hearing in the Supreme Court. Pertinent here is what was said in Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal. App. 2d 1, 3, 204 P. 2d 387, 388:

"'We are impressed that the facts in the instant case bring it within the rule that if a party is dissatisfied with the judgment as rendered in an appellate court, his remedy is to petition for a rehearing or modification of the judgment within the time allowed by law and before the remittitur has issued.'"

The California Supreme Court stated in *Southwestern Inv. Corp. v. City of Los Angeles*, 38 Cal. 2d 623, 241 P. 2d 985, 988:

"But an appellate court has no appellate jurisdiction of its own judgment; and it has no power to recall the remittitur for the purpose of reconsidering or modifying its judgment on the merits.

"The decisions above cited establish that the extraordinary remedy by motion to recall the remittitur may be invoked only in cases of fraud or imposition practiced upon the court or upon the opposite party, or where the judgment was based on a mistake of fact or occurred through inadvertence. None of these is present when the court renders the judgment advisedly upon the case as presented by the parties. Estate of Ross, supra, 189 Cal. 317, 318, 207 P. 1014. * * * A motion to recall the

remittitur is not justified as an opportunity to the parties to relitigate their cause nor to the appellate court to redetermine the merits. * * *."

From the foregoing it is clear that there was an adequate state ground for the refusal of the California Supreme Court to recall its remittitur.

More recently, in the case of *Bloeth v. State of New York*, 7 L. Ed. 2d 780, 781, 82 S. Ct. 661, 662, Mr. Justice Harlan stated, in denying an application for stay of execution:

> "It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion for reargument. In such circumstances it is clear that this Court would be without jurisdiction to consider them. E. G. Herndon v. Georgia, 295 US 441, 443, 79 L. ed 1530, 1532, 55 S Ct 794; Radio Station W O W v. Johnson, 326 US 120, 128, 89 L. ed 2092, 2099, 65 S Ct 1475."

In the last case cited by Justice Harlan, *Radio Station WOW v. Johnson, supra*, the Supreme Court stated:

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition." (89 L. Ed. at p. 2100, 326 U. S. at p. 128).

Likewise, in *Herndon v. Georgia*, 295 U. S. at p. 443, 79 L. Ed. at p. 1532, the court states:

> "The long-established general rule is that the attempt to raise a federal question after judgment,

upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.'

A fortiori, where the petitioner, as in this case, has not even raised the question on motion for rehearing, the attempt to raise it after the California Supreme Court's decision became final comes too late. The denial by the California Supreme Court of the petitioners' motion to recall remittutur "* * * was in no aspect equivalent to a decision against a right under the Constitution of the United States specially set up or claimed at the proper time and in the proper way." *(Duncan v. State of Missouri,* 14 S. Ct. 570, 152 U. S. 377, 383-384, 38 L. Ed. 485, 488.

Comments Respecting Statement of the Case.

By reason of the numerous grossly inaccurate and misleading statements made in the petitioners' statement, we deem it necessary to comment at some length on the facts as shown by the record. In the California Superior Court the plaintiffs, Teitelbaum Furs, Inc., a California corporation, Teitelbaum Furs, Inc., a New York corporation, and Teitelbaum Furs of Palm Springs, Inc., a California corporation, sought recovery from defendant insurance carriers for an alleged theft of furs. Before the action was commenced Albert Teitelbaum, president of petitioner corporations, was convicted of staging a fake robbery and the filing of false and fraudulent insurance claims with the insurance company defendants in this action. Petitioners conceded at the trial of the action and in their briefs that the corporate plaintiffs were *alter egos* of Albert Teitelbaum. One of the defenses set up by defendants in their pleadings

and at trial was that the combination of Albert Teitelbaum's conviction with the *alter ego* status between himself and the petitioner corporations was *res judicata* and precluded recovery.

The California Supreme Court held, with abundant evidence in the record to sustain its holding in addition to the concessions made by the petitioners, that the corporations were *alter egos* of Albert Teitelbaum, that Mr. Teitelbaum's previous criminal conviction for filing false claims with defendants to obtain the proceeds of the same insurance policies sued on in this action barred the action by his corporate *alter egos*, which are petitioners here. The only point actually raised by the facts is a contention, although not stated, that application of the *alter ego* doctrine to petitioners deprived them of federal rights. Petitioners' statement of fact and statement of issues is entirely inaccurate and not in accordance with the record in that it assumes that a separate corporate entity has been precluded from recovery by the conviction of an officer. In fact, however, the application of *res judicata* was based upon proved and conceded privity of Albert Teitelbaum with the corporations which were but his *alter egos*.

Mr. Teitelbaum's conviction resulted from claims made to defendants to obtain the proceeds of the same insurance policies sued on in this action. Judgment of conviction on the indictment by the Los Angeles Grand Jury to commit grand theft, attempted grand theft and the presentation and filing of false insurance claims was sustained on appeal. (*People v. Teitelbaum*, 163 Cal. App. 2d 184, hear. den. October 24, 1958; cert. denied by the United States Supreme Court, 359 U. S. 206).

Prior to the trial of the civil action the defendants made certain "Requests for Admission" to the plaintiffs, which plaintiff-petitioners admitted by their failure to deny them. These admissions were introduced in evidence at trial, as follows:

"No. 12. 'That Albert Teitelbaum, did, acting in his capacity as president of all of the plaintiff corporations, cause to be delivered to Carl Gable a certain tentative list of property allegedly missing as a result of an alleged burglary which allegedly occurred on December 27, 1955; that said list was introduced into evidence in the case of People vs. Albert Teitelbaum, et al., case No. 178748 in the Superior Court of the State of California, in and for the County of Los Angeles, as a 'People's exhibit.'

"No. 13: 'That the indictment numbered SMC No. 178748 in the Superior Court of the State of California, in and for the County of Los Angeles, entitled the People of the State of California, Plaintiff, vs. Albert Teitelbaum, et al., Defendants, *concerned the same purported theft and the same insurance claims as are sued upon by plaintiff in this action No. 762724.*'

The Court: *672724.*

Mr. White: Thank you, your Honor. I misread it.

"14: 'That Albert Teitelbaum, the president of each of plaintiff corporations, in criminal case No. 178748 in the Superior Court of the State of California, in and for the County of Los Angeles, was convicted of conspiracy to commit grand theft, attempted grand theft, and filing of false and fraud-

ulent insurance claims in violation of Penal Code Section 182, Penal Code Section 484, and Insurance Code Section 550; *that said conviction resulted from the presentation of documents respecting a purported loss to the insurance companies which are defendants to this action No. 672724 concerning the alleged theft mentioned and sued upon by plaintiffs' amended complaint in this action No. 672724.*" (emphasis supplied). [Rep. Tr. p. 2006, line 8, to p. 2007, line 17].

It was thus established by admissions of the plaintiffs that Albert Teitelbaum's conviction concerned the same purported theft and the same insurance claims as those sued upon in this action and that the conviction resulted from the presentation of documents respecting a purported loss to the defendants. Petitioners' contentions to the contrary are unsupported by the record of the case.

In their Petition for Writ of Certiorari plaintiffs have contended that the decision of the California Supreme Court holds that "When an officer of corporations is convicted in a criminal case of a crime connected with their insurance it becomes *res judicata*". This, however, is not the holding. In fact, the court held that when a person who is not only an officer of corporations but likewise who stands in the position of *alter ego* to the corporations, then the said corporations, being mere *alter egos* of the person convicted of staging a fake robbery and filing false insurance claims, will be defeated by the operation of *res judicata* and collateral estoppel. (See Appendix B to Petition for Writ of Certiorari: Opinion of the Supreme Court of California, pp. 28, 29).

Contrary to the plaintiffs' contentions, there was no jury finding, either implicit or explicit, contrary to the ruling of the California Supreme Court that the plaintiff companies were *alter egos* of Mr. Teitelbaum. To the contrary, defendants' requested instruction No. 64, which would have presented the issue to the jury exactly in accordance with the ruling of the Supreme Court, was refused by the trial judge. This proffered but refused instruction read as follows:

"DEFENDANTS' REQUESTED INSTRUCTION NO. 64

"In the event you find that the corporate entities of the plaintiff corporations should be ignored under the 'alter ego' doctrine which I have explained to you in the other instructions, then you are to consider the prior conviction of Albert Teitelbaum as a bar to recovery by the corporate plaintiffs in this action.

"Refused

A. A. Scott, Judge"

[Rep. Tr. p. 2474, lines 14-22].

Rather than instructing the jury in accordance with the proffered instruction the trial judge instructed them at the request of the plaintiffs-petitioners:

> "You are instructed that there is a presumption that Albert Teitelbaum, an officer of plaintiff corporations, is innocent of any crime or wrong." [Rep. Tr. p. 2434, lines 13-15].

and further instructed the jury that Mr. Teitelbaum's conviction could be considered "for only one purpose, namely, in judging the credibility of that witness" [Rep.

Tr. p. 2433, lines 23-24]. It is clear, therefore, that the assertion that the jury passed upon the *alter ego* question is incorrect since it was never submitted to the jury.

Uncontradicted evidence, however, clearly showing that the plaintiff corporations were *alter egos* of Mr. Teitelbaum was presented at trial, as was set forth in Respondents' Brief and Cross-Appellants' Opening Brief, as follows:

> "The applicability to this case of decisions permitting piercing of the corporate veil was established by evidence which showed that, in effect all of the plaintiff corporations were one man operations and that fraud would result from a failure to recognize that the plaintiff corporations were the double and *alter ego* of Al Teitelbaum and the intermediary through which he transacted his business. Although Sylvia Teitelbaum, a director of the plaintiff corporations, testified at her deposition, read into the record, that the corporation never loaned any money to a Mr. Lanza and that 'any money that was loaned to Mr. Lanza was personal' [Rep. Tr. p. 1283, lines 17-22], Mr. Teitelbaum admitted that the corporation had loaned Mr. Lanza sums of money and that during the years 1954 and 1955 this amounted to $57,000 [Rep. Tr. p. 500, lines 4-14]. When payment came from Mr. Lanza on that account, Mr. Teitelbaum was not even certain that it 'went into the corporation' [Rep. Tr. p. 500, lines 15-19]. The corporation never declared a dividend [Rep. Tr. p. 604, lines 2-4]. According to the Teitelbaum bookkeeper, Brodkin, Mr. Teitel-

baum had a 'loan account', where he borrowed and paid back money; on many occasions when such loans were made Mr. Teitelbaum gave the bookkeeper instructions to write the checks and he never presented any resolution of the board of directors to such effect [Rep. Tr. p. 783, line 20, to p. 784, line 16]. Mr. Teitelbaum ordered the bookkeeper to understate excise taxes [Rep. Tr. p. 1969, lines 12-20]. On several occasions, when the bookkeeper Mrs. Bleick (Connie Fairchild) discovered that furs had been sold without records being made, Mr. Teitelbaum ordered her to make out a sales receipt for such merchandise [Rep. Tr. p. 1944, line 24, to p. 1945, line 9]. Mr. Teitelbaum also received checks to the corporation and put them in his pocket, disposed of them and later told the bookkeeper what the disposition was [Rep. Tr. p. 2182, line 22, to p. 2183, line 2]. The record is entirely devoid of any evidence that the corporations were anything but the vehicles through which Mr. Teitelbaum conducted his personal business. Prior to the incorporation in 1946 Al Teitelbaum was the sole owner of the business. Thereafter, his wife, Sylvia Teitelbaum acquired some stock interest. Al Teitelbaum and his wife were directors of the corporation and Mrs. Teitelbaum's mother, Jennie Hoffman, was likewise a director at the beginning of the incorporation. According to Mrs. Teitelbaum, her mother was a director 'a long time ago' and was not a director for 'too long a time.' After her resignation she was not replaced on the Board of Directors [Rep. Tr. p. 1282, line 19, to p. 1283, line 13]. Thus, the 'cor-

poration' did not have three directors, as required by the Corporations Code, Section 800." (Resp. Br., and Cross-App. Op. Br. pp. 122-124).

Not only did the evidence establish that in effect all of the plaintiff corporations were one-man operations and that fraud would result from a failure to recognize that the plaintiff corporations were the double and *alter ego* of Albert Teitelbaum and the intermediary through which he transacted his business, but further, that even the corporate form of business was ignored in that the "corporations" did not even pretend to act through a Board of Directors, since a board did not exist.

The plaintiffs presented no evidence at trial which would show or tend to show that the *alter ego* doctrine should not apply but, rather, to the contrary, conceded this important point in their briefs and at trial.

In their original brief to the District Court of Appeal, "Respondents' Brief and Cross-Appellants' Opening Brief", quoted from *supra*, the respondent defendants set forth at some length the evidence presented to the trial court which would require a finding that the plaintiff corporations were the double and *alter ego* of Albert Teitelbaum (see Resp. Br. and Cross-App. Op. Br. pp. 122-124). The position of the defendants was not controverted by plaintiffs at any place in their "Appellants' Reply Brief and Cross-Respondents' Brief". Quite to the contrary, it was in that document unequivocally stated at page 59:

> "If, as Defendants contend, the Plaintiff Corporations were merely *alter egos* of Mr. Teitelbaum, a legal position which we have at no time sought to refute, there can be no justified criticism

of Mr. Teitelbaum cashing or using a portion of check proceeds payable to his companies whether or not the books did, as done here, reflect the transaction."

Plaintiffs also conceded at page 103 of their "Cross-Respondents' Brief":

"No attempt has been made to hide Mr. Teitelbaum behind the skirts of his Corporations or to avoid any ill effects that would result from disregarding his Corporate entities. The insurance was issued to the Plaintiffs as Corporations and they sued as such."

At trial Mr. Kalik, representing the Teitelbaum Corporations, stated respecting Mr. Teitelbaum: "he is not hiding behind any corporation's skirts", and, "We are not saying that the corporation is different than Mr. Teitelbaum * * *" [Rep. Tr. p. 2378, lines 17-24].

In their Petition for Hearing before the California Supreme Court, the defendants stated: "The privity of Mr. Teitelbaum with the named corporate plaintiffs has been conceded by the plaintiffs in their Appellants' Reply Brief filed with the District Court of Appeal * * *" (Pet. for Hear. p. 3), and thereafter set forth the portions of said "Appellants' Reply Brief" where the concession was made. No where in the present petitioners' "Answer to Petition for Hearing" was any claim made on behalf of the Teitelbaum Corporations that no concession had been made but, to the contrary, that entire brief was based upon the assumption that "*alter ego*" had been established and, further, in that brief Mr. Kalik used the following language: "Both Mr. Teitelbaum and *his* Corporations * * *" (Answer to

Pet. for Hear. p. 28 (emphasis supplied.) As shown by the record, it was proved at trial without contradictory evidence that the corporate plaintiffs were but the *alter egos* of Mr. Teitelbaum. This important point was conceded by plaintiffs' counsel at trial and in their appellate briefs and during the pendency of the appeal in the California District Court of Appeal and Supreme Court. Counsel for petitioners at no time during the trial of the appeal contended that *alter egos* had not been proved and conceded.

Petitioners have intimated that one of the issues tried was a claim that "* * * the criminal prosecution of Teitelbaum was inspired by the insurance companies to defeat the insurance claims." In the joint pre-trial statement it was set forth by the defendants that there was no issue on this subject. A perusal of the testimony at trial shows that there was no evidence whatsoever presented in support of this claimed issue. A complete study of the briefs filed on behalf of the Teitelbaum corporations in the California District Court of Appeal and the California Supreme Court shows likewise that no such "issue" was urged to the California reviewing courts. Since the issue was never regularly presented to the California courts for their determination, it would appear to be contrary to settled rules that it should first be presented to the Supreme Court of the United States.

Plaintiffs have also endeavored to make a point of the alleged demotion of Captain Borders and the reasons therefor at page 10 of their Petition. No evidence on this subject was presented at trial. The Clerk's Transcript reference at page 10 of the Petition refers to cer-

tain newspaper clippings filed as a portion of an affidavit of Horace Kalik in his opposition to defendants' motion for new trial. These matters were ordered stricken by reason of the failure of plaintiffs to comply with California Code of Civil Procedure Section 659a and California Superior Court Rule 3, subdivision 5 [Clk. Tr. p. 150]. Parenthetically, it should be noted that the defendants' motion for new trial on the grounds that there was insufficient evidence to justify the verdict and irregularity of the proceedings of the adverse party through their attorney which prevented the defendants from having a fair trial was granted [Clk. Tr. p. 150].

Plaintiffs have further argued that the jury was denied the right to infer that Teitelbaum's conviction was "the result of perjured testimony knowingly produced by Borders, a police officer and officer of the state", and then argue that at the criminal trial Borders had "produced" one Clifford Vanderwyst. The record in this case, however, is devoid of any evidence tending to support this belated argument made here on behalf of petitioners but never raised in this action at trial or on appeal to the appellate courts of the State of California. It is noteworthy that where petitioners engage in flights of fancy of this type they studiously avoid making any citation to the record, this avoidance being because the record does not contain evidence to support their misleading allegations. Petitioners have also argued in that portion of their brief labeled "Statement" that "The Supreme Court * * * applied retrospectively the law it proclaimed." A reading of the Opinion of the California Supreme Court, however, discloses that it was not a retrospective application but rather the Cali-

fornia Supreme Court followed and applied the rule which that court had proclaimed in *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892, decided March 30, 1942 (rehearing denied April 3, 1942).

Question Presented.

At pages 21 through 25 of the "Petition for Writ of Certiorari" certain alleged issues are set forth. They are not, however, issues because the facts assumed therein are not contained in the entire record, are not true, and appear to result from unfamiliarity with the record by petitioners. Petitioners have attempted to raise a number of issues based upon an assumption of facts not contained in the entire record and based on assertions not brought to the attention of any California court until after judgment of the California Supreme Court had become final. Whereas the record clearly shows that jurisdiction does not exist and that no federal question has been raised, if it were appropriate to state a question from the actual record it would necessarily read substantially as follows: Where it has been proved and conceded and held by the highest state court that certain corporations are but the *alter egos* of their president, and the highest state court, applying state law in effect for twenty years, holds that the principle of *res judicata* precludes the corporate *alter egos* from maintaining an action wholly inconsistent with the prior final conviction of their president standing in an *alter ego* relationship to them, is there any constitutional prohibition against the state's so applying its final judgment to prevent fraud and the relitigation of decided issues by privies of the convicted person?

The California Supreme Court Followed Established Law in Holding That Mr. Teitelbaum's Conviction Was Res Judicata.

The California Supreme Court did not act retrospectively or retroactively. *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P. 2d 892, was decided March 6, 1942 and rehearing denied April 3, 1942. In that case, which was relied on and followed by the California Supreme Court in the instant matter, the California rule respecting *res judicata* and the requirements for its application was clearly set forth and several prior decisions inconsistent with it were reversed. The requisites set forth in the *Bernhard* case are, as noted by the California Supreme Court in the Teitelbaum case (App. B, p. 29), as follows:

> "'Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?'"

The California Supreme Court stated:

> "The record in the present case provides affirmative answers to each of these questions."

That the California Supreme Court intended its rule to apply to criminal as well as civil adjudications was indicated in its decision in *Bernhard*, in which case the court cited with approval *Eagle, etc., Ins. Co. v. Heller*, 149 Va. 82, 140 S. E. 314, 57 A. L. R. 490, in which case the Virginia court had held that conviction for arson precluded a later recovery against the insurance company by the convicted arsonist.

Petitioners' comment upon a refusal to apply collateral estoppel to an acquittal is inapplicable here. There is good reason, as pointed out in the court's opinion in *In re Anderson*, 107 Cal. App. 2d 670, 237 P. 2d 720, that an acquittal should not be *res judicata* in subsequent litigation. The court states:

> "* * * The acquittal was "merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused" Lewis v. Frick, 233 U. S. 291, 302, 34 S. Ct. 488, 492, 58 L. Ed. 967, [973]. It did not determine that Mitchell had not wilfully attempted to evade the tax. * * *" (237 P. 2d at p. 721).

At page 37 of the "Petition for Writ of Certiorari", petitioners have incorrectly attempted to limit the issues before the court in the civil case. The issue was not simply whether the insurance companies had breached a contract, but also whether the plaintiffs' action was barred by reason of misrepresentation and fraud as provided in the policies, whether the plaintiff corporations were the double and *alter ego* of Albert Teitelbaum, whether Albert Teitelbaum's conviction would prevent recovery by plaintiff corporations.

It is clear from the uncontradicted evidence that the issues determined by Albert Teitelbaum's conviction, which required proof beyond a reasonable doubt, were identical to the issues as to plaintiffs' action being barred by reason of dishonesty, misrepresentation and fraud.

The policy provisions [Ex. 2] respecting fraud and dishonesty pleaded by defendants as a bar to plaintiffs' recovery, are as follows:

"MISREPRESENTATION AND FRAUD.

This policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." [Clk. Tr. p. 27, lines 23-27].

* * * * *

"4. EXCLUSIONS:

"THIS POLICY DOES NOT INSURE AGAINST:

"(A) Loss, damage or expense caused by or resulting from sabotage, theft, conversion or other act or omission of a dishonest character (1) on the part of the Assured or his or their employees, or (2) on the part of any person to whom the property hereby insured may be delivered or entrusted by whomsoever for any purpose whatsoever, unless such loss arises while the goods are deposited for safe custody by the Assured, officer of the corporation, member of the firm or salesman while traveling, or while the goods are in the custody of (a) the Post Office Department as first class registered mail, or (b) a common carrier or (c) a person serving as a mere porter or helper not on the payroll of the Assured" [Clk. Tr. p. 26, lines 4-17].

* * * * *

"It is understood and agreed that the risks of infidelity or dishonesty of any person or persons to whom the said goods may be entrusted and or conversion and or consequential damage are excluded hereunder." [Clk. Tr. p. 27 lines 11-13].

The petitioners' erroneous contention that the issues were entirely different totally ignores these policy provisions and petitioners' admissions that the indictment concerned the same purported theft and insurance claims as are sued upon by plaintiffs in this action, and further ignores the binding admission that the conviction resulted from the presentation of documents respecting a purported loss to the insurance companies. [See Requests for Admission which were admitted and introduced into evidence, Rep. Tr. p. 2000, line 8, to p. 2007, line 17*].

Application of Alter Ego Doctrine and Res Judicata by United States Supreme Court

The *alter ego* doctrine has been applied by the United States Supreme Court and by various United States District Courts of Appeal. As stated by Mr. Justice Clarke for the Court in *Chicago, Milwaukee & St. Paul*

*California Code of Civil Procedure, Section 2033, provides, in part: "Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed files and serves upon the party requesting the admission either (a) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time."

Railway Company v. Minneapolis Civic & Commerce Association, 247 U. S. 490, 501, 38 S. Ct. 553, 62 L. Ed. 1229, 1237:

> "While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. United States v. Lehigh Valley R. Co. 220 U. S. 257, 273, 55 L. Ed. 458, 463, 31 Sup. Ct. Rep. 387, and United States v. Delaware, L. & W. R. Co., 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

See, also:

Davis v. Alexander, 269 U. S. 114, 117, 46 S. Ct. 34, 70 L. Ed. 186;

Hollander v. Henry, 186 F. 2d 582 (U. S. C. A., Second).

The United States Supreme Court denied certiorari in the case of *Connecticut Fire Insurance Co. v. Ferrara*, 277 F. 2d 388 (rehearing denied), certiorari de-

nied, 364 U. S. 903, 5 L. Ed. 2d 195, 81 S. Ct. 231, where the United States Court of Appeals for the Eighth Circuit had held that an insured's conviction for arson precluded his recovery in a civil suit brought against his insurance companies.

Conclusion.

Defendants and respondents respectfully urge that petitioners, having failed to submit any federal question to the trial court or during the regular process of appeal in the California District Court of Appeal and Supreme Court, have failed to follow the procedure for certiorari required by this Honorable Court's rules and decisions. The refusal of the California Supreme Court to grant the belated Motion to Recall Remittitur did not involve a decision against a right under the Constitution of the United States but, to the contrary, was based upon adequate state grounds. The facts of the case, as distinguished from assertions erroneously made in the "Petition for Writ of Certiorari", disclose that the California Supreme Court acted correctly under rules long recognized in California and by the United States Supreme Court in precluding a retrial of issues finally determined by dealing with the substance of the transaction involved and ignoring the fiction of corporate agency by reason of abundant evidence and concessions made by petitioners' counsel.

Respectfully submitted,

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